Supreme Court, U.S.
FILED

97 1030 DEC 2 2 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

IN RE: CONTINENTAL AIRLINES,

Debtor,

LPP CLAIMANTS,

Petitioners,

against

CONTINENTAL AIRLINES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

MYLES J. TRALINS
Counsel of Record
Suite 3310 One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 374-3300

Counsel for Petitioners

RICHARD M. GALE
Suite 3310 One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 374-3300

Co-Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether The Third Circuit's Opinion Which Authorizes The Debtor To Unilaterally Alter Or Terminate The Labor Protective Provisions Of A Collective Bargaining Agreement Under Circumstances Where 11 U.S.C. § 1113 Was Not Complied With Violates The Mandate Of Congress And Is In Direct Conflict With Decisions Of The Second And Sixth Circuit Courts Of Appeal.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT BELOW

LPP Claimants, Petitioners

The names of the individual LPP Claimants are listed in Appendix F.

Continental Airlines, Debtor

Effective Date Committee

Honorable John Stonitsch, Trustee

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS ENTERED IN THE CASE 1

BASIS FOR JURISDICTION 1

STATUTES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

The Third Circuit's Opinion Which Authorizes The Debtor To Unilaterally Alter Or Terminate The Labor Protective Provisions Of A Collective Bargaining Agreement Under Circumstances Where 11 U.S.C. § 1113 Was Not Complied With Violates The Mandate Of Congress And Is In Direct Conflict With Decisions Of The Second And Sixth Circuit Courts Of Appeal 9

APPENDIX

Appendix A: *In re Continental Airlines*, 125 F.3d 120 (3rd Cir. 1997) .....App. 1

Appendix B: Order Denying Petition for Rehearing, rendered September 23, 1997 .....App. 43

Appendix C: Excerpt from *In re Continental Airlines, et al.*, No. 93-163 (D. Del. Nov. 29, 1995) .....App. 46

TABLE OF CONTENTS – Continued

Page

Appendix D: *L. D. Schulte Grievance, Eastern Air Lines Pilots System Board of Adjustment,* ALPA Case No. 1-86.....App. 49

Appendix E: Allegheny-Mohawk Labor Protective Provisions .....App. 87

Appendix F: List of Individual LPP Claimants..App. 100

TABLE OF AUTHORITIES

Page

Cases

Eastern Air Lines, Inc. v. Air Line Pilots Association, International, 861 F.2d 1546 (11th Cir. 1988).. 6, 11, 13

In re Continental Airlines, 125 F.3d 120 (3rd Cir. 1997)..... 1

In re Continental Airlines, et al., No. 93-163 (D. Del. Nov. 29, 1995).....1, 8

In re Continental Airlines, Inc., et al., Nos. 90-932 through 90-984 (Bankr. D. Del. February 11, 1993)..... 1

In re Ionosphere Clubs, Inc., 922 F.2d 984 (2nd Cir. 1990)..... *passim*

In re Unimet Corp., 842 F.2d 879 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988).....10, 11, 14

L. D. Schulte Grievance, Eastern Air Lines System Board of Adjustment, ALPA Case No. 1-86 ..... 7, 11, 12, 13, 15, 17

Statutes and Rules

Supreme Court Rule 13.1 1

11 U.S.C. § 101(5) 8, 14

11 U.S.C. § 362..... 6

11 U.S.C. § 502..... 7

11 U.S.C. § 503(b) 14

11 U.S.C. § 1113..... *passim*

11 U.S.C. § 1113(f).....9, 10, 14

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 158(a)(1) 8

28 U.S.C. § 158(d) 8

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1334(b) 7

OPINIONS AND ORDERS ENTERED IN THE CASE

In re Continental Airlines, 125 F.3d 120 (3rd Cir. 1997); *In re Continental Airlines, Inc., et al.*, No. 93-163 (D. Del. Nov. 29, 1995); *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, (Bankr. D. Del. February 11, 1993) (Order Granting Motion for Partial Objection to Allowance of Claims), (Bankr. D. Del. February 11, 1993) (Order Granting Motion for Partial Summary Judgment), (Bankr. D. Del. April 16, 1993) (Findings of Fact, Conclusions of Law and Order Confirming the Debtors' Revised Second Amended Joint Plan of Reorganization)

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 1254(1) of Title 28, *United States Code* to review by writ of certiorari the judgment and opinion of the United States Court of Appeals for the Third Circuit dated August 29, 1997, (App. A at page App. 1), rehearing denied September 23, 1997, (App. B at page App. 43), affirming a judgment of the United States District Court for the District of Delaware entered on November 29, 1995, which affirmed a final order of the United States Bankruptcy Court for the District of Delaware rendered in April 16, 1993. This petition has been filed within 90 days of the denial of rehearing as required by Supreme Court Rule 13.1.

STATUTES INVOLVED IN THE CASE

Section 1113 of Title 28, *United States Code*, which is involved in this case, provides:

> **§ 1113. Rejection of collective bargaining agreements**
>
> **(a)** The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
>
> **(b)(1)** Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall –
>
> > **(A)** make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
> >
> > **(B)** provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that –

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of

the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

STATEMENT OF THE CASE

On February 23, 1986, Eastern Air Lines and its pilots' union ratified a collective bargaining agreement. (App. A at page App. 5.)

The collective bargaining agreement included sections 2(a), 3 and 13 of the Allegheny-Mohawk Labor Protective Provisions (LPPs). (App. A at pages App. 5-6; App. E at pages App. 87-88, App. 99.)

The LPPs provide for protection of the seniority rights of Eastern pilots "in the event of a merger between Eastern and another airline [ ] through the integration of Eastern's seniority list with the merging carrier's seniority list." (App. A at page App. 6.)

Texas Air Corporation, the parent of Continental, acquired Eastern on February 24, 1986. (App. A at pages App. 5-6.)

The union, on the basis that Texas Air's acquisition constituted a merger within the meaning of the LPPs, requested a meeting with Eastern, Continental and Texas Air to integrate Eastern and Continental's seniority lists. (App. A at page App. 6.)

Eastern and Continental refused to meet. (App. A at page App. 7.)

The union initiated arbitration proceedings before the National Mediation Board to compel Eastern and Continental to integrate their seniority lists because of the carriers' merger. (App. A at page App. 7.)

Eastern filed bankruptcy in March, 1989, and refused, with the approval of the bankruptcy court, to submit to the National Mediation Board arbitration, relying on the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362. (App. A at page App. 7.)

The union appealed, the district court reversed and the Second Circuit Court of Appeals affirmed in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2nd Cir. 1990), ordering Eastern to arbitration and holding that "other provisions of the Bankruptcy Code *are inoperable* to the extent that they allow a debtor to bypass the requirements of section 1113."

In addition to Eastern's refusal to arbitrate, the airline and the union disputed the substantive meaning of a handwritten portion of the collective bargaining agreement which included the LPPs.

Unable to reach agreement, the union "filed a grievance with the Eastern Air Lines Pilots System Board of Adjustment, the arbitral panel responsible under the RLA [sic: Railway Labor Act] for adjudicating disputes arising out of the labor contracts between Eastern and its pilots." *Eastern Air Lines, Inc. v. Air Line Pilots Association, International*, 861 F.2d 1546, 1548 (11th Cir. 1988).

Following litigation initiated by the airline which sought to avoid the arbitration, the Eleventh Circuit Court of Appeals directed that "The SBA [sic: System

Board of Adjustment] will be charged with determining the contours of the disputed provisions." *Id.* at 1555.

Subsequently, the System Board ruled that monetary damages in lieu of jobs was not a remedy under the collective bargaining agreement, that "the heart" of the labor protective provisions was seniority integration and that "the board should not issue any award . . . which is not definitely intended and calculated to recognize meaningful LPP protection for pilots as a matter of contractual right under the February 23 Agreement." *L. D. Schulte Grievance, Eastern Air Lines System Board of Adjustment,* ALPA Case No. 1-86 (App. D at page App. 82.)

The LPP arbitration proceedings commenced, however now Continental, which had filed Chapter 11 bankruptcy proceedings, advised the arbitrator, *after* the Second Circuit ruled on the identical issue asserted by Eastern, that it would not participate because of the automatic stay provision. (App. A at page App. 8.)

The arbitrator rejected Continental's position and, in August, 1992, issued a decision based upon the Second Circuit's ruling in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, that he had jurisdiction. (App. A at pages App. 8-9.)

This action subsequently commenced as an adversary proceeding pursuant to 11 U.S.C. § 502, 28 U.S.C. § 1334(b), from a civil proceeding arising under the Bankruptcy Code, and arising in and related to Continental Airlines' Chapter 11 proceedings, wherein Continental sought to avoid its duty to arbitrate the LPP claims. (App. A at page App. 9.)

On April 16, 1993, the Delaware bankruptcy judge entered an order confirming Continental's Joint Second Plan of Reorganization permanently enjoining any arbitration involving the LPPs, (App. A at page App. 38), determining that "the equitable remedy of seniority integration constituted a 'claim' within the meaning of § 101(5) of the bankruptcy code" and that "the remedy could be converted to an award of money damages" as a "general, dischargeable, unsecured claim that was entitled to no administrative priority." (App. A at page App. 11.)

The LPP claimants appealed to the District Court pursuant to 28 U.S.C. § 158(a)(1) which reversed the injunction and required Continental but affirmed the rendition of the LPP claim into money, opining that "the right to arbitrate the LPP dispute may be of limited practical utility to the LPP Claimants. Any award that might be granted by the arbitrator would be an unsecured pre-petition claim and may come after the assets of the bankruptcy estate have been wholly depleted." (Excerpt from *In re Continental Airlines, et al.*, No. 93-163 (D. Del. Nov. 29, 1995); (App. C at pages App. 47-48, n. 31.)

The Petitioners then appealed to the Third Circuit pursuant to 28 U.S.C. § 158(d), which issued its judgment and opinion August 29, 1997, affirming the district court "in all respects." (App. A at page App. 42.) Rehearing was denied September 23, 1997. (App. B at page App. 43.)

REASONS FOR GRANTING THE WRIT

The Third Circuit's Opinion Which Authorizes The Debtor To Unilaterally Alter Or Terminate The Labor Protective Provisions Of A Collective Bargaining Agreement Under Circumstances Where 11 U.S.C. § 1113 Was Not Complied With Violates The Mandate Of Congress And Is In Direct Conflict With Decisions Of The Second And Sixth Circuit Courts Of Appeal

The Third Circuit's decision requires review as a matter of great importance as it directly violates the Congressional mandate of 11 U.S.C. Section 1113(f) (1988):

> **No provision of [the Bankruptcy Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of [section 1113].**

Under circumstances where the Third Circuit recognized that "Continental's failure to reject the collective bargaining agreement consistent with the mandate of section 1113 of the Code renders the injunction [preventing Continental from being required to participate in National Mediation Board labor arbitration proceedings regarding enforcement of the labor protective provisions of the collective bargaining agreement] invalid," (App. A at page App. 38), the Third Circuit nonetheless authorized the bankruptcy court to alter and, in effect, terminate the collective bargaining agreement by holding that "any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment." (App. A at page App. 36.)

By so ruling, the Third Circuit is also in direct conflict with decisions of the Second Circuit and the Sixth Circuit in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2nd Cir. 1990)[1] and *In re Unimet Corp.*, 842 F.2d 879 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988).[2]

The Second Circuit, finding that "Section 1113 was enacted as the legislative response to the Supreme Court's decision in *Bildisco*" which was "representative of the ill that Congress sought to cure," concluded:

> **Subsection 1113(f) evinces an intent that other provisions of the Bankruptcy Code *are inoperable* to the extent that they allow a debtor to bypass the requirements of section 1113.**

In re Ionosphere Clubs, Inc., 922 F.2d at 989.

Moreover,

> [t]he language of the statute indicates that **Congress intended Section 1113 to be the sole method by which a debtor could terminate or modify a collective bargaining agreement and**

---

[1] *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, which required Eastern Air Lines to arbitrate whether it had been merged with Continental Airlines and, if so, to determine how the LPP Claimants are to be integrated into Continental's pilot work force, is particularly relevant as the Third Circuit's conflicting decision concerns the identical collective bargaining agreement, subject matter and parties.

[2] In *In re Unimet*, 842 F.2d at 885, which concludes that "Congress intended [1113] to give broad protection to collectively bargained for rights which are threatened by a corporate reorganization," the Sixth Circuit rejected arguments that another section of the Bankruptcy Code could be utilized to reject the claim and that Section 1113 must be narrowly interpreted.

> **that application of other provisions of the Bankruptcy Code that allow a debtor to bypass the requirements of Section 1113 *are prohibited.***

Id. at 989-990 (emphasis supplied).

Here, the Third Circuit's decision, premised on the theory that "substitution of the equitable remedy in no way amounts to an alteration or termination of the terms of the collective bargaining agreement," (App. A at page App. 40 n. 15), is in direct conflict with the Second Circuit's decision in *In re Ionosphere Clubs, Inc.*, 922 F.2d at 989-990 and the Sixth Circuit's decision in *In re Unimet Corp.*, 842 F.2d 879, 884 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988) holding that:

> Section 1113 prohibits the employer from *unilaterally* modifying *any provision* of the collective bargaining agreement.

The scope of the subject collective bargaining agreement was to be determined by the Eastern System Board of Adjustments in *L. D. Schulte Grievance, Eastern Air Lines System Board of Adjustment*, ALPA Case No. 1-86 (App. D commencing at page App. 49), pursuant to the order of the Eleventh Circuit Court of Appeals in *Eastern Air Lines, Inc. v. Air Line Pilots Association, International*, 861 F.2d 1546, 1555 (11th Cir. 1988).

"ALPA filed a grievance with the Eastern System Board of Adjustments, the body established to hear and determine disputes concerning the collective bargaining agreement." *In re Ionosphere Clubs, Inc.*, 922 F.2d at 987.

The System Board considered Eastern's position that the collective bargaining agreement "provides LPP protection for pilots only as specified in Sections 3 and 13 of the Allegheny-Mohawk LPP's" and ALPA's position that the LPP's "incorporates the full package of Allegheny-Mohawk LPP's" or "all of the protections of the TWA LPP's."[3] *L. D. Schulte Grievance,* (App. D at page App. 55.)

Included in the "full package" was Section 7 of the LPPs which provides for ***"lump sum [ ] separation allowance[s]" in lieu of a job.*** (App. E, LPP Section 7 at page App. 94.)

In rendering its decision, ***the System Board eliminated monetary damages as a remedy under the LPPs in the collective bargaining agreement.***

The record in this case does not justify any conclusion "that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's." *L. D. Schulte Grievance,* (App. D at page App. 72.)

Thus,

> . . . the evidence in the present case does not sustain ALPA's contention that the pecuniary allowances provided in the Allegheny-Mohawk

---

[3] There are 13 sections in the labor protective provisions of the Allegheny-Mohawk LPPs. (App. E). All, excepting the right to seniority integration, the application date of benefits and the protection of jobs in the same class, craft and field of endeavor provide for money payments.

> LPP's may be asserted, in addition to the protection of Sections 3 and 13, as a matter of contractual right by Eastern's pilots.[4]

L. D. Schulte Grievance, (App. D at page App. 79.)

Accordingly, ignoring the fact that the Eleventh Circuit held that the System Board's determination of the "contours of the disputed provisions" by the SBA would be binding on the airline and the union, *Eastern Air Lines, Inc.*, 861 F.2d at 1555, the Third Circuit's ruling that "monetary payment is an alternative for the equitable remedy of seniority integration," (App. A at page App. 29), impermissibly altered the collective bargaining agreement which expressly excluded ***"lump sum*** [ ] ***separation allowance[s]" in lieu of a job.*** (App. E, LPP Section 7 at page App. 94.)

Moreover, in authorizing "lump sum [ ] separation allowance[s]," *id.*, in lieu of jobs by holding that "the right to seniority integration gives rise to a 'right of payment' such that the remedy constitutes a 'claim' dischargeable in bankruptcy" (App. A at page App. [illegible], the Third Circuit has violated the directive of Congress which prohibits application of **"other provisions of the Bankruptcy Code" in order to "allow a debtor to bypass the requirements of Section 1113."** *In re Ionosphere Clubs, Inc.*, 922 F.2d at 990.

---

[4] The Third Circuit mistakenly relies on section 1 of the LPPs to conclude that "monetary damages is consistent with the articulated scope and purpose and is therefore appropriate." Section 1 – and monetary damages – pursuant to the System Board decision are not part of the subject collective bargaining agreement. (App. A at page App. 28 n. 12).

Accordingly, the Third Circuit's express reliance on 11 U.S.C. § 101(5) to alter the right to seniority integration provided for in the collective bargaining agreement into a "claim" which "gives rise to a right of payment" (App. A at page App. 25), directly conflicts with the Second Circuit's holding in *In re Ionosphere Clubs, Inc.*, 922 F.2d at 989, that **"Subsection 1113(f) evinces an intent that other provisions of the Bankruptcy Code *are inoperable* to the extent that they allow a debtor to bypass the requirements of section 1113."**

The decision likewise conflicts with the Sixth Circuit's determination in *In re Unimet Corp.*, 842 F.2d at 884, that Section 1113 does not yield to 11 U.S.C. § 503(b) for purposes of determining whether qualification as an administrative expense is necessary for the union to prevail.

> . . . section 1113 unequivocally prohibits the employer from *unilaterally* modifying *any provision* of the collective bargaining agreement. Accordingly, we hold that Unimet cannot escape its obligations in this regard merely because the requirements of section 503 have not been satisfied.

Indeed, the effect of the Third Circuit's ruling is to impermissibly eviscerate the collective bargaining agreement.

The System Board held that "Sections 3 and 13 are the heart of the Allegheny-Mohawk LPP's because they control seniority:"

> . . . even without the pecuniary allowances, as desirable as they may be, **the protection of *seniority integration itself* by application of**

> **Sections 3 and 13 *is of such critical importance that this without more does constitute meaningful protection* under the February 23 Agreement.**

L. D. Schulte Grievance, (App. D at page App. 79 (emphasis supplied).)

Accordingly, the System Board concluded that it "should not issue any award in this case which is not definitely intended and calculated to recognize meaningful LPP protection for pilots as a matter of contractual right under the February 23 Agreement." *L. D. Schulte Grievance,* (App. D at page App. 82.)

The Third Circuit's ruling, "in the absence of Continental's compliance with the requirements to reject the collective bargaining agreement" (App. A at page App. 40), which terminates the critically important meaningful protection of seniority integration provided under the express terms of the collective bargaining agreement and substitutes a general unsecured pre-petition claim in bankruptcy, impermissibly acts to "nullify effectively the arbitration clause in the collective bargaining agreement and would substitute the court's judgment for that of the arbitrator." *In re Ionosphere Clubs, Inc.*, 922 F.2d at 992.

Finally, the Third Circuit, opining as a finder of fact, justifies its approval of the unilateral alteration of the collective bargaining agreement because seniority integration "has the potential to create an environment rife with hostility and low employee morale, not to mention a detrimental effect on employer-employee relations" which "circumstances indicate that seniority integration would not be a feasible remedy and that an alternative

remedy of monetary damages would be appropriate." (App. A at pages App. 35-36).

First, Continental Airlines contracted for and agreed to the LPPs which the Third Circuit worries over. Moreover, Continental elected not to alter or terminate the collective bargaining agreement providing for seniority integration under Section 1113 and, indeed, contracted for and is bound by the LPPs irrespective of the Third Circuit's perceptions about what may or may not happen if Continental is required to honor its contract. As the decision notes:

> Throughout this litigation, Continental has premised its arguments on the assumption that it is bound by the LPPs and has a duty to arbitrate the LPP dispute . . . **In light of the overwhelming advantage that Continental derived from maintaining the position that it was bound by the collective bargaining agreement,** and thus, had a duty to arbitrate the LPP dispute, **we refuse to allow Continental to repudiate that representation** and return to the district court to litigate the issue whether it is bound by the agreement.

(App. A at page App. 41 (emphasis supplied).)

Section 1113 simply does not allow the court, sua sponte, to strike out Continental's contractual obligation on the supposition that strife might result if the agreement were enforced.

Second, as the Second Circuit observed in *In re Ionosphere Clubs, Inc.*, 922 F.2d at 992, in direct conflict with the Third Circuit's worry: **"if the Trustee believes that the threat of slowdowns or other disturbance is such that he wishes to undo the arbitration award, he has**

open to him either a return to the arbitrator or a rejection of the contract in the manner Congress prescribed in 11 U.S.C. Section 1113." Congress provided a remedy for the Third Circuit's concern; one which Continental elected not to avail itself of when it did not seek to alter or terminate the collective bargaining agreement.

Third, **"the debtor in possession or trustee has the contractual duty to adhere to the substantive provisions of the agreement . . . "** *In re Ionosphere Clubs, Inc.*, 922 F.2d at 992.

The Third Circuit's ruling authorizes Continental to ignore the "substantive provisions of the agreement" by removing "the heart of the Allegheny-Mohawk LPP's" which "control seniority" from the collective bargaining agreement. *L. D. Schulte Grievance,* (App. D at page App. 80.)

Finally, the impact of the Third Circuit's ruling is the impermissible termination of the collective bargaining agreement.

The right to seniority integration through enforcement of the labor protective provisions of the collective bargaining agreement accepted by Continental Airlines will provide jobs to pilots whose airline merged with Continental.

Transforming the jobs protected as a result of the merger through operation of the terms of the collective bargaining agreement into a money damages claim in the bankruptcy effectively destroys the collective bargaining

agreement itself as no employees covered by the agreement will have the right to a job. As such, the decision requires reversal:

> **"We conclude, from the language of the statute, statements made by the sponsors of the legislation, and the context in which it was enacted, that Congress intended that a collective bargaining agreement remain in effect and that the collective bargaining process continue after the filing of a bankruptcy petition unless and until the debtor complies with the provisions of section 1113."**

In re Ionosphere Clubs, Inc., 922 F.2d at 992.

The Third Circuit's decision, in violation of the mandate of Congress and in clear conflict with the rulings of the Second and Sixth Circuits, operates to unilaterally terminate the collective bargaining process. Accordingly, this Court should grant certiorari.

Dated: December 19, 1997

Respectfully submitted,

MYLES J. TRALINS
Suite 3310 One Biscayne Tower
Miami, Florida 33131
(305) 374-3300
Counsel for Petitioner

RICHARD M. GALE
Suite 3310 One Biscayne Tower
Miami, Florida 33131
(305) 374-3300
Co-Counsel for Petitioner

APPENDIX A

In re Continental Airlines, 125 F.3d 120 (3rd Cir. 1997)

Filed August 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-7028 and 96-7038

IN RE: CONTINENTAL AIRLINES,

Debtor

AIR LINE PILOTS ASSOCIATION

v.

CONTINENTAL AIRLINES
LPP CLAIMANTS; EFFECTIVE DATE COMMITTEE,

Claimants

HONORABLE JOHN STONITSCH,

Trustee

LPP CLAIMANTS,

Appellant No. 96-7028

(Caption amended in accordance with
Clerk's Order dated 3/4/96)

IN RE: CONTINENTAL AIRLINES,

Debtor

App. 2

AIR LINE PILOTS ASSOCIATION

v.

CONTINENTAL AIRLINES
LPP CLAIMANTS; EFFECTIVE DATE COMMITTEE,

Claimants

HONORABLE JOHN STONITSCH,

Trustee

CONTINENTAL AIRLINES, INC.,

Appellant No. 96-7038

(Caption amended in accordance with
Clerk's Order dated 3/4/96)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 93-cv-00163)

ARGUED MARCH 13, 1997

BEFORE: MANSMANN, LEWIS and
MICHEL,* *Circuit Judges.*

(Filed August 29, 1997)

---

* Honorable Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

Jon. A. Geier (ARGUED)
Paul, Hastings, Janofsky & Walker
1299 Pennsylvania Avenue, N.W.
10th Floor
Washington, DC 20004

Laura D. Jones
Robert S. Brady
Young, Conaway, Stargatt & Taylor
Post Office Box 391
Rodney Square North, 11th Floor
Wilmington, DE 19899-0391

Attorneys for Continental Airlines

Michael J. Isaacs
Agostini, Levitsky & Isaacs
623 King Street
Post Office Box 2323
Wilmington, DE 19899

Myles J. Tralins (ARGUED)
Tralins & Associates
One Biscayne Tower
2 South Biscayne Boulevard
Suite 3310
Miami, FL 33131

Attorneys for LPP Claimants

John A. McGuinn (ARGUED)
Schmeltzer, Aptaker & Shepard
2600 Virginia Avenue, N.W.
Suite 1000
Washington, DC 20037

Attorney for Eastern Pilots Merger Committee

OPINION OF THE COURT

LEWIS, *Circuit Judge.*

In this appeal and cross-appeal, we are confronted with a tension between bankruptcy law and labor law. The dispute arose when the Air Line Pilots Association, Inc. ("ALPA"), collective bargaining agent for Eastern Air Lines' ("Eastern") pilots, filed proofs of claim in bankruptcy court against Continental Airlines Holdings, Inc. and Continental Airlines, Inc. ("Continental"). These claims were based on alleged seniority integration rights stemming from a pending labor arbitration dispute and were filed following Continental's acquisition of Eastern and subsequent refusal to bargain over the seniority integration of Eastern's pilots.

The bankruptcy court determined that the claims could be satisfied by monetary awards in lieu of specific performance and enjoined scheduled arbitration proceedings to enforce the seniority rights under the collective bargaining agreement. The district court affirmed the bankruptcy court's determination relating to the claims, but vacated the injunction. Two groups of former Eastern pilots, the LPP Claimants and the Group of 31, both of which are no longer represented by ALPA, appealed to this court.[1]

---

[1] "LPP Claimants" refers to a group of former Eastern pilots whose claims in this appeal are based on certain "labor protective provisions" (LPPs) contained in the collective bargaining agreement. The "Group of 31" is a group of former

Resolution of this dispute requires us to determine: (1) whether the bankruptcy claims that the LPP Claimants and the Group of 31 seek to enforce constitute "claims" within the meaning of the bankruptcy code and thus are satisfiable, in the alternative, by a monetary award; and (2) whether the arbitration of a labor dispute that may give rise to the right to seniority integration under a collective bargaining agreement can be enjoined, where the debtor has not explicitly rejected the agreement. We conclude that the rights to seniority integration do constitute "claims" within the meaning of the bankruptcy code. Accordingly, we find that the right to seniority integration gives rise to a right of payment and that any equitable remedy recovered against Continental via arbitration of the underlying labor dispute may be satisfied through an award of monetary damages. We further conclude that the district court properly vacated the injunction barring arbitration of the underlying labor dispute. Thus, we will affirm.

I.

A. *The Underlying LPP Dispute*

On February 23, 1986, following intense negotiations, Eastern and its pilots' union, ALPA, ratified a collective bargaining agreement. On February 24, 1986, the Texas

---

Eastern pilots, who originally were part of the "LPP Claimants" group and who have retained separate counsel for purposes of this appeal. *See* discussion *infra* Part I.D. While both groups claims were filed in bankruptcy court by ALPA on their behalf, these two groups are no longer represented by ALPA. *See* discussion *infra* note 5.

Air Corporation ("Texas Air"), parent corporation to Continental, acquired Eastern. Believing that the acquisition constituted a "merger" within the meaning of certain "labor protective provisions" (LPPs) contained in the collective bargaining agreement, ALPA requested a meeting with Texas Air, Eastern, and Continental to discuss the integration of Eastern's and Continental's seniority lists. Under the LPPs, Eastern's pilots secured protection of their seniority rights in the event of a merger between Eastern and another airline carrier through the integration of Eastern's seniority lists with the merging carrier's list. Specifically, the LPP terms provide:

> Section 2(a). The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.
>
> * * *
>
> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representative of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
>
> * * *
>
> Section 13(a). In the event that any dispute or controversy . . . arises with respect to the protections provided herein, which cannot be settled

> by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination.

(Labor Protective Provisions, sections 2(a), 3, and 13(a)).[2]

Despite ALPA's requests, both Eastern and Continental refused to bargain with ALPA about the integration of the seniority lists. Consequently, ALPA requested the National Mediation Board to proffer a list of seven arbitrators from which a neutral arbitrator could be chosen to determine whether an alleged merger occurred between Eastern and Continental that triggered the LPP seniority integration provision (LPP dispute). Eastern, however, filed for bankruptcy in March, 1989, and refused to submit to arbitration pursuant to the bankruptcy code's section 362 automatic stay provision. 11 U.S.C. § 362 (providing that petitions filed pursuant to Chapter 11 operate as a stay of the commencement or continuation of judicial, administrative, or other actions or proceedings against the debtor). In bankruptcy court, ALPA sought relief from the automatic stay to compel Eastern to arbitrate the LPP dispute. The bankruptcy court denied ALPA's petition. After much litigation, however, the

---

[2] The LPPs were based on the standard Allegheny-Mohawk LPPs, which were designed to provide "displacement and dismissal allowances to employees adversely affected by [merger] transaction[s], the equitable integration of seniority lists, and binding arbitration of disputes relating to the LPPs." (Decision of the Eastern Air Lines Pilots System Board of Adjustment). *See Air Line Pilots Ass'n v. Dept. of Transp.*, 838 F.2d 563, 565 (D.C. Cir. 1988) (citing *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1972)).

Court of Appeals for the Second Circuit held that the section 362 automatic stay provision did not preclude arbitration in this instance. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990).

ALPA and Eastern proceeded to arbitration in April, 1991, commencing with a pre-hearing conference before Richard R. Kasher (Kasher Arbitration). In this proceeding, ALPA sought prospective integration of seniority lists, back pay from the effective date of the merger to the date of the arbitration award, and front pay from the date of the arbitration award to the date that the Eastern pilots would complete training and begin flying for Continental. Prior to the pre-hearing conference, Arbitrator Kasher solicited brief statements of position from the parties to the dispute, and from all potential parties. Eastern consistently maintained that the LPP dispute was not properly within the arbitrator's jurisdiction.[3] Continental filed a statement informing Arbitrator Kasher that it had filed a Chapter 11 petition for reorganization in December, 1990. Therefore, it maintained that the arbitration pursued by ALPA was stayed under section 362 of the bankruptcy code and could not proceed without the express approval of the bankruptcy court.

In August, 1992, Arbitrator Kasher issued a decision concluding that he had jurisdiction over the LPP dispute, and could render a determination of the appropriate

---

[3] Eastern maintained that only the System Board of Adjustment had jurisdiction to determine whether a merger occurred that triggered the LPPs. On the merits, Eastern contended that if the arbitration proceeded, the Arbitrator should conclude that no merger occurred.

remedies under the circumstances. Kasher, relying on the bankruptcy court's determination in *In re Ionosphere Clubs, Inc.*, 114 B.R. 379 (Bankr. S.D.N.Y. 1990), specifically rejected Continental's suggestion that the arbitration was barred by the automatic stay. Kasher scheduled hearings on the merits of the dispute, to commence in February, 1993.

B. *The Bankruptcy Court Proceedings*

In September, 1991, while the initial Kasher Arbitration decision was pending, ALPA, on behalf of its members, filed proofs of claim against Continental in Delaware Bankruptcy Court. Their claims were based on the asserted right to seniority integration under the LPPs and specified an unliquidated amount as the debt for which Continental was obligated. In response, Continental initiated an adversary proceeding in bankruptcy court against ALPA, seeking injunctive and declaratory relief relating to the proofs of claim. In that action, Continental filed a Partial Objection To Allowance of Claims and a Motion for Partial Summary Judgment on its Partial Objection.[4] In both motions, Continental contended that

---

[4] Prior to the Kasher Arbitration decision, Continental filed an initial motion for partial summary judgment, seeking a preliminary injunction. Continental argued that the arbitration should be enjoined to protect the jurisdiction of the bankruptcy court over the administration of its estate. It also maintained that the automatic stay provision of the bankruptcy code precluded the arbitration from proceeding. Finally, Continental contended that it was not a party to the collective bargaining agreement between Eastern and ALPA and that it could not be bound by the result of any arbitration over the LPPs.

the seniority integration that the claimants sought was not feasible because it would be detrimental to Continental's successful reorganization. Thus, Continental sought a declaration that the claims were, at best, "general, dischargeable, pre-petition, unsecured claims," compensable by an award of monetary damages.

ALPA and the LPP Claimants each filed a separate response to Continental's Partial Objection and Motion for Partial Summary Judgment.[5] ALPA contended that, contrary to Continental's argument, the claims pursued were not general, unsecured pre-petition claims that could be converted to a payment of money damages. ALPA also argued that only an arbitrator had jurisdiction to determine the appropriate remedy under the LPPs. The LPP Claimants essentially maintained that an arbitration proceeding was the appropriate forum to determine the issue of whether a merger occurred that triggered the LPPs, and that the proper remedy was integration of Eastern's seniority lists with Continental's lists.

In February, 1993, the bankruptcy court judge, in two orders, granted Continental's Partial Objection To Allowance of Claims and its related motion for partial summary judgment, determining that there was no genuine issue for trial and that Continental was entitled to judgment as a matter of law. *In re Continental Airlines,*

---

[5] ALPA's representation of the LPP Claimants ceased after the LPP Claimants instituted actions in federal court against ALPA. The actions alleged causes of action for the breach of the duty of fair representation and defamation arising out of the publication and dissemination of a "blacklist" and for alleged violations of the civil provisions of RICO.

Inc., et al., Nos. 90-932 through 90-984 (Bankr. D. Del. Feb. 11, 1993) (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153 (Bankr. D. Del. Feb. 11, 1993) (order granting motion for partial summary judgment). Addressing the jurisdictional argument asserted by ALPA, the bankruptcy court concluded that the issue of whether any award granted to ALPA would constitute general, unsecured, prepetition claims was a core matter under the bankruptcy code. Thus, it concluded that it had jurisdiction to resolve the matter. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 1-2 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153, slip op. at 2 (order granting motion for partial summary judgment). The court then determined that the equitable remedy of seniority integration constituted a "claim" within the meaning of § 101(5) of the bankruptcy code. Accordingly, the court concluded that the remedy could be converted to an award of money damages. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 3-4 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153, slip op. at 3-4 (order granting motion for partial summary judgment). Finally, the court determined that any right of payment asserted by ALPA was, at best, a general, dischargeable, unsecured claim that was entitled to no administrative priority. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 4-5 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153,

slip op. at 5 (order granting motion for partial summary judgment).

In April, 1993, Continental's Second Amended Joint Plan of Reorganization was confirmed by the bankruptcy court. The court's confirmation order incorporated its prior rulings from the two orders issued in February, 1993. Essentially, it clarified that any valid claims based on the LPPs would give rise to a right of payment dischargeable in bankruptcy and that no right to injunctive, equitable or other prospective relief would flow from any valid claim based on an award under the LPPs. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984 (Bankr. D. Del. April, 1993) (Findings of Fact, Conclusions of Law and Order Confirming the Debtors' Revised Second Amended Joint Plan of Reorganization). The court also enjoined the arbitration of the LPP dispute. Continental's plan of reorganization was consummated in late April, 1993.

C. *The ALPA/Continental Settlement*

ALPA and the LPP Claimants appealed the bankruptcy court's February and April, 1993 orders to the district court. While the appeals were pending, ALPA and Continental settled the LPP dispute. The Settlement Agreement, ultimately approved by the bankruptcy court, finally resolved all of ALPA's claims including those pursued in Continental's bankruptcy proceeding and those based on the enforcement of the LPPs in the Kasher Arbitration. Under the terms of the agreement, ALPA agreed to withdraw its appeals to the district court. The Settlement Agreement also provided an option to the

"pilots formerly employed by Eastern" who were no longer represented by ALPA, and who had filed proofs of claim in the bankruptcy proceeding, to participate in the settlement. Approximately two-thirds of these pilots did so.

D. *The District Court Proceedings*

Prior to the ALPA/Continental settlement, Continental filed a motion to dismiss ALPA's and the LPP Claimants' appeals. Continental argued that the appeals from the confirmation order were moot because: (1) the plan of reorganization had been substantially consummated; (2) it was not feasible for the plan to be undone; and (3) any alteration to the plan's fundamental terms would be inequitable. After the settlement, Continental filed a second motion to dismiss the appeals as moot, contending that the LPP Claimants had no individual right to maintain their claims based on the LPPs because ALPA, as the exclusive bargaining representative of the Eastern pilots, had full authority to settle the LPP grievance. Thus, Continental argued, the pilots were bound by the settlement agreement.

In a comprehensive memorandum opinion, the district court addressed the issues appealed by ALPA and the LPP Claimants and presented in Continental's motions to dismiss.[6] As to the first motion to dismiss, the court concluded, *inter alia,* that ALPA's and the LPP

---

[6] Although the ALPA/Continental settlement agreement provided that ALPA would dismiss its appeal to the district court, ALPA failed to do so prior to the district court's disposition. Ultimately, ALPA did withdraw its claims against Continental. ALPA is not a party to this appeal.

Claimants' appeals relating to the claim for administrative priority was moot. In support of its conclusion, the court emphasized the substantial consummation of the plan. Specifically, the court noted that the investment leading to the consummation of the plan was based on an overall limit on administrative claims and a determination that ALPA and the LPP Claimants were not entitled to equitable relief. *In re Continental Airlines, Inc., et al.*, No. 93-163 (D. Del. Nov. 29, 1995). As to Continental's second motion to dismiss as moot, the court determined that it could not consider the merits of whether the LPP Claimants had standing under the LPPs to pursue seniority integration individually. Specifically, the court concluded that this issue should be determined by the arbitrator. Therefore, the court refused to dismiss their claims based on their alleged lack of standing to assert the contractual right. *Id.* at 22-25. The court also rejected Continental's argument that the LPP Claimants were bound by the ALPA/Continental settlement. *Id.* at 23.

Turning to the merits of the appeals, the court affirmed the orders of the bankruptcy court in all respects, except for the bankruptcy court's injunction of the arbitration proceedings. *Id.* at 26-45. Relating to the injunction, the court concluded that the bankruptcy court's failure to adequately set forth the reasons for the issuance of the injunction and to describe the acts restrained in its order, as mandated by Federal Rule of Civil Procedure 65(d), was fatal to the validity of the injunction. *Id.* at 34-37. Although it vacated the injunction, the district court refused to remand the matter to the bankruptcy court with instructions to strike the injunction. Rather, the court concluded that under section 1113

of the bankruptcy code, the bankruptcy court could not enjoin the arbitration even if the requirements of Rule 65(d) were met. *Id.* at 37-40.[7]

The LPP Claimants appealed the district court's order. Continental cross-appealed on the issues of the mootness of the claims and the dissolution of the injunction. On appeal, the Group of 31, a group of former Eastern pilots who previously had been represented by counsel for the LPP Claimants, have obtained substitute counsel, and have filed a separate brief. For purposes of brevity, the Group of 31 and the LPP Claimants will be referred to collectively as "the Claimants" where permissible.

The district court had jurisdiction under 28 U.S.C. § 158(a). We exercise jurisdiction of the appeal and the cross-appeal from the district court's order pursuant to 28 U.S.C. § 158(d).

II.

Our review of the district court's determination is plenary. *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988); *see In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988 (2d Cir. 1990). We exercise the same review of the district court's decision as that

---

[7] The court reached this issue only after determining that in spite of the invalidity of the injunction under Rule 65(d), the statutory injunction under 11 U.S.C. § 524, referenced by the bankruptcy court in its order, survived. *In re Continental Airlines, Inc., et al.*, No. 93-163, slip op. at 37, (D. Del. Nov. 29, 1995).

exercised by the district court. *Brown,* 851 F.2d at 84. The bankruptcy court's findings of fact are reviewable only for clear error. *Id.* Legal determinations are subject to plenary review. *Id.*

Before we reach the merits of the parties' claims, we must address Continental's two challenges to the Claimants' appeals contending that the appeals should be dismissed. First, Continental maintains that the LPP Claimants' notice of appeal is defective for lack of adequate identification of the parties to the appeal under Federal Rule of Appellate Procedure 3(c). Next, Continental argues that the Claimants' lack standing to assert claims for individual seniority integration under the LPPs and that the appeals should be dismissed as moot.

A. *Appellate Jurisdiction*

Continental requests that the LPP Claimants' appeal be dismissed pursuant to Federal Rule of Appellate Procedure 3(c) for failure of their notice of appeal to identify each member of its group participating in this appeal. The notice of appeal filed by the LPP Claimants simply identifies the appellants as "the LPP Claimants." Continental argues that this identification is insufficient, emphasizing that a number of the LPP Claimants participated in the Continental/ALPA settlement and, consequently, waived their claims on appeal. Continental contends that the notice of appeal did not specify those members who did not waive their claims and who are appealing from the district court's order. We reject this argument, and conclude that the LPP Claimants notice of appeal adequately identifies the appellants.

The requirements of Rule 3(c) are jurisdictional. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 320-21, 108 S. Ct. 2405, 2411, 101 L.Ed.2d 285 (1988). In *Torres*, the Supreme Court explained that permitting a court to exercise jurisdiction over parties not named in a notice of appeal would be equivalent to extending the time prescribed to file a notice of appeal, a power not granted to the court. *Id.* at 315. Thus, the failure of a notice of appeal to name a party constitutes a jurisdictional bar to the appeal, and thus a failure of that party to appeal. *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 554 (3d Cir. 1989).

Generally, rules of procedure should be liberally construed. *Torres*, 487 U.S. at 316. In *Torres*, the Supreme Court emphasized that, "mere technicalities should not stand in the way of consideration of a case on its merits." *Id.* (internal quotations omitted). Thus, in the context of Rule 3(c), jurisdiction may be appropriate if a litigant's actions are functionally equivalent to the requirements of Rule 3(c). *Masquerade Novelty v. Unique Industries*, 912 F.2d 663, 665 (3d Cir. 1990). We have applied this construction numerous times to support a finding of jurisdiction in the absence of strict, technical compliance with the requirements of Rule 3(c). *See id.* (where the contents of documents filed within the time prescribed to file a notice of appeal contain the information required by Rule 3(c), the party will be deemed to have complied with the rule and the case will not be dismissed for lack of appellate jurisdiction); *Dura Systems, Inc.*, 886 F.2d at 554-55 (Consent Order filed by the appellants within the time prescribed to file a notice of appeal served as the "functional equivalent" of what Rule 3(c) required such that the technical

failure of the actual notice of appeal was not a bar to jurisdiction); *see also In re Bertoli*, 812 F.2d 136 (3d Cir. 1987) (litigant's filing of a "Notice of Motion for Certification of An Interlocutory Appeal" in the district court within the thirty-day time period allowed to file a notice of appeal was sufficient to satisfy Rule 3(c) where the litigant failed to file an actual notice of appeal; the document communicated an intention to appeal and identified the judgment appealed from and the court to which the appeal was taken).

The purpose of Rule 3(c)'s identification requirement is to provide notice to the court and the opposing parties of the identity of the appellants. *Torres*, 487 U.S. at 318; *Dura Systems, Inc.*, 886 F.2d at 555. Since ALPA and the LPP Claimants filed their appeals in the district court, the LPP Claimants have been identified as a group of former Eastern pilots, no longer represented by ALPA, seeking to enforce their seniority integration rights under the LPPs. When ALPA settled its claims with Continental, both Continental and ALPA, via the settlement agreement, granted the LPP Claimants the opportunity to participate in the settlement. Continental was well aware of the individuals who elected to exercise this option. The settlement agreement specifically required those pilots electing to participate in the settlement to execute one of two forms indicating an intent to participate in the settlement and to return the form to Continental. Those individuals who opted to settle their claims waived their right to appeal. Thus, the group of LPP Claimants dwindled to an identifiable, discrete entity made up of those individual pilots who chose not to participate in the settlement.

The term "LPP Claimants" has been subject to a common understanding among all parties to this litigation relating to the individuals comprising the group. Accordingly, we conclude that the LPP Claimants' notice of appeal sufficiently identifies the entity such that Continental, as well as this Court, is adequately apprised of the identity of the appellants such that appellate jurisdiction is proper. In so doing, we follow the Supreme Court's directive to construe Rule 3(c) liberally and to avoid a construction that would permit "mere technicalities" to bar the consideration of this case on the merits. *Masquerade Novelty*, 912 F.2d at 666 (quoting *Dura Systems*, 886 F.2d at 555).

B. *Whether the Claimants' Appeals are Moot*

Continental argues that the Claimants' appeals are moot, relying on ALPA's settlement of its LPP dispute with Continental. Essentially, Continental maintains that the claim settled by ALPA was a "group" claim. Thus, Continental argues, when ALPA settled the dispute, it settled the claim on behalf of the entire group on whose behalf it filed the bankruptcy claims, including the Group of 31 and the LPP Claimants. According to Continental, then the relevant question is whether "if [individual rights to seniority integration arbitration under the LPPs] existed at all, [those] rights survived ALPA's settlement of the group grievance." In the district court, Continental challenged the LPP Claimants' individual standing under the LPPs to prosecute their rights to seniority integration. The district court declined to consider the merits of this argument, explaining that the issue constituted a "minor" dispute under the Railway Labor Act, 45 U.S.C.

§§ 151-163, and was subject to the jurisdiction of the arbitrator. We conclude that because the Claimants' individual rights to prosecute their claims for seniority integration have not been established under the LPPs, we need not address whether the Claimants' individual rights to seniority integration survived ALPA's settlement of the dispute.

The right to seniority integration under the LPPs turns on whether a "merger" between Eastern and Continental occurred within the meaning of the LPPs. This determination depends on the meaning, interpretation and proper application of the LPPs. In turn, the issue of standing to maintain an individual claim for seniority integration under the LPPs is a "minor" dispute under the Railway Labor Act, 45 U.S.C. §§ 151-163. *See Consolidated Rail v. Labor Executives,* 491 U.S. 299, 302 (1989) ("major disputes seek to create contractual rights, minor disputes to enforce them") (*quoting Elgin, J & E. Ry. Co. v. Burley,* 325 U.S. 711, 723, 65 S. Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945) (minor disputes are those relating either to the meaning or proper application of a particular provision with reference to a specific situation)); *Chicago & Northwestern Transp. v. Local Union 214,* 829 F.2d 1424, 1427 (7th Cir. 1987). Accordingly, the issue of standing is subject to the exclusive jurisdiction of the arbitrator, and the district court properly concluded that its role relating to this issue was to protect the jurisdiction of the arbitration board. *Consolidated Rail,* 491 U.S. at 304 ("the [National Railroad Adjustment] Board . . . has exclusive jurisdiction over minor disputes. Judicial review of the arbitral decision is limited."); *Chicago & Northwestern Transp.,* 829 F.2d at 1428.

Consistent with the federal courts' role relating to minor disputes, i.e., to protect the jurisdiction of the arbitration board, federal courts cannot inquire into the merits of an underlying dispute except to the extent necessary to determine its proper characterization as minor or major. *Chicago & Northwestern Transp.*, 829 F.2d at 1428. Nor may the courts decide what remedy is appropriate if the agreement is interpreted to require recovery of a remedy. *General Com of Adj., United Transp. Union v. CSX R.R.*, 893 F.2d 584, 592-93 (3d Cir. 1990). Thus, the district court properly concluded that it could not consider the merits of Continental's argument that the Claimants did not have standing under the LPPs. As the Claimants' right to prosecute their claims for seniority integration have not been established under the LPPs, we find that we need not address Continental's argument that their individual rights did not survive ALPA's settlement of the LPP dispute.

C. *Merits of the Appeal*

1. *Bankruptcy Court's Jurisdiction*

Before we determine whether the bankruptcy court properly determined the status of the Claimants' claims, we must address the Claimants' contention that the bankruptcy court did not have jurisdiction over the matter. The Claimants maintain that because the LPP dispute arose wholly outside the bankruptcy context, the matter is a "non-core" dispute over which the bankruptcy court did not have jurisdiction. The flaw in the Claimants' argument is that they confuse the disposition of the merits of the underlying LPP dispute with the treatment

of their claims in bankruptcy. The bankruptcy court had exclusive jurisdiction over the latter.

A bankruptcy court has jurisdiction over all "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1) (1993); *In re Wood*, 825 F.2d 90, 95 (5th Cir. 1987). Section 157(b) does not define "core proceedings." However, the phrase has been interpreted to apply to those rights that are created by federal bankruptcy law:

> If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding . . . If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a proof of claim or an objection to the discharge of a particular debt.

In re Wood, 825 F.2d at 97. *See Beard v. Braunstein*, 914 F.2d 434 (3d Cir. 1990) (acknowledging the standard for "core proceedings" articulated in *Wood*).

There can be no dispute that the issue as to whether the bankruptcy claim could be satisfied by a monetary award is a "core bankruptcy matter." By filing a proof of claim against Continental's estate in bankruptcy court, the Claimants "invoke[d] the special rules of bankruptcy concerning objections to the claim, [and] estimation of the claim." *Wood*, 825 F.2d at 97. Further, the issue decided by the bankruptcy court was how the claim would be treated in bankruptcy. Thus, the bankruptcy court was well within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claim. Our conclusion is consistent with principles that govern the disposition of issues when bankruptcy law and labor law intersect. *See*

L.O. Koven & Brothers, Inc. v. Local Union No. 5767, 381 F.2d 196, 205 (3d Cir.1966) ("Questions involving an interpretation of the Bankruptcy Act should be decided by the court, while questions involving an interpretation of the collective bargaining agreement should if feasible be decided by the arbitrator."); *see also Garland Coal & Mining Co. v. United Mine Workers*, 778 F.2d 1297, 1304 (8th Cir.1985) ("Once the arbitrator has decided the liability issue, the case should be returned to the bankruptcy court to decide the questions of allowability and priority of claims."). Accordingly, we conclude that the bankruptcy court had jurisdiction to determine whether the Claimants' claims could be satisfied by a monetary award in lieu of specific performance.[8]

---

[8] For the same reasons, we reject the Group of 31's efforts to invoke the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, to implicate the bankruptcy court's jurisdiction to determine how the claims will be treated in bankruptcy. Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101.

The Group of 31 contends that despite the district court's order vacating the injunction the ruling that the remedy in arbitration can be "reduced" from full seniority integration to a claim for front pay "is as clearly an injunction and interference with the Kasher arbitration as was the bankruptcy court's

2. *Whether the Equitable Remedy Constitutes a Claim Under the Bankruptcy Code*

The LPP Claimants' and the Group of 31's primary contention on appeal is that the right to the equitable remedy of seniority integration under the LPPs cannot be converted into a claim for money damages. The Claimants emphasize that they seek specific performance under the LPPs, and they vehemently argue that the payment of

---

blanket injunction against the continuation of the arbitration." The conversion of the equitable remedy to front pay, upon successful challenge at the arbitration proceedings, only affects the administration of the claim in bankruptcy. It does not operate to enjoin the arbitrator, nor does it dictate any particular remedy. *Cf. Lukens*, 989 F.2d at 677 (order directing an arbitrator not to preside over any newly ordered arbitration and deeming prior arbitration ineffectual involved operated as an injunction). Thus, we will not disturb the bankruptcy court's exercise of jurisdiction over the matter.

Similarly we reject the Claimants' argument that the determination whether the equitable remedy can be converted to a payment of money damages is inconsistent with the district court's conclusion that the individual right to seniority integration under the LPPs involves a "minor" dispute, subject to the exclusive jurisdiction of the arbitrator. *See* discussion, *supra* Part II.B. We discern no inconsistency between the bankruptcy court's exercise of jurisdiction to determine the status of the bankruptcy claim and the district court's characterization of the issue of the Claimants' standing under the LPPs as a "minor" dispute. The bankruptcy court's ruling related only to the manner in which the Claimants' claims in bankruptcy would be treated if a right to seniority integration is established. This ruling, unlike the standing issue, does not turn on an interpretation of the LPPs. Thus, the bankruptcy court's determination of the status of the claims and the district court's refusal to consider the merits of the standing issue was not inconsistent.

money damages is not a viable alternative to the equitable right to seniority integration.

The district court rejected the Claimants' argument, holding that seniority integration under the LPPs gave rise to a "right of payment" within the definition of a "claim" under the bankruptcy code. In support of its conclusion, the district court further determined that money damages are a viable alternative to seniority integration.

The bankruptcy code defines "claim" as

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). The term "claim" as defined in the bankruptcy code is construed broadly to permit debtors to meet all of their legal obligations in bankruptcy and to enable holders of claims to participate in the bankruptcy proceedings. *See Ohio v. Kovacs*, 469 U.S. 274, 279, 83 L.Ed.2d 649, 105 S.Ct. 705 (1985) ("Congress desired a broad definition of claim."); *see, e.g., Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (debtors' obligation to pay restitution as a condition of probation which arose out of a criminal conviction for welfare fraud constituted a "debt" within the meaning of the bankruptcy code that gave rise to a "claim" under the code).

Under section 101(5), an equitable remedy can be deemed a "claim" if that remedy "gives rise to a right of payment." We are guided as to what constitutes a "right

of payment" under the bankruptcy code by the Supreme Court's analysis in *Ohio v. Kovacs*. In *Kovacs*, the petitioner, the State of Ohio, obtained an injunction ordering the respondent, William Kovacs, to clean up a hazardous waste site. After Kovacs failed to comply with the injunction, the State obtained the appointment of a receiver, who was directed to take possession of all of Kovacs' assets and property and to clean up the waste site. Subsequent to the appointment of the receiver, Kovacs filed for bankruptcy. In response, the State filed a complaint in bankruptcy seeking a declaration that Kovacs' obligation under the injunction was not dischargeable in bankruptcy because it was not a liability on a "claim" under the bankruptcy code.

The Supreme Court held that the obligation imposed by the injunction had been converted to an obligation to pay money that was dischargeable in bankruptcy. *Kovacs*, 469 U.S. at 283. Critical to the Court's conclusion was its determination that the appointment of a receiver had dispossessed Kovacs of the property and therefore, had removed Kovacs' ability to cooperate with the receiver and remove the waste from the site in compliance with the injunction. Specifically, the Court stated:

> The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets . . . and to comply with the injunction. . . . As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and

> divested him of assets that might have been used by him to clean up the property . . . Although Kovacs had been ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs . . . Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied.

Id. at 283. Thus, the Court concluded that under the circumstances, the clean up order had been converted into an obligation to pay money. *Id.* at 283.

In *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir.1993), we addressed the issue whether a regulatory obligation directing a Chapter 11 debtor to develop a plan to ameliorate an ongoing environmental hazard could be converted into a "claim" in bankruptcy. In that case, Torwico Electronics, a manufacturing business, filed for Chapter 11 bankruptcy and listed the New Jersey Department of Environmental Protection and Energy (the "Department") as a creditor with a disputed and unliquidated claim. After Torwico filed its petition for bankruptcy, the Department performed an on-site inspection of Torwico's property and found hazardous waste, for which it issued a notice of violation to Torwico. Two months later, the deadline for filing proofs of claim in Torwico's bankruptcy case passed. The Department had failed to file any proof of claim by this deadline.

The Department, seeking to enforce Torwico's obligation under state and federal environmental laws, issued an Administrative Order requiring Torwico to submit a written closure plan for the hazardous site and assessing a monetary penalty for failure to take action under the earlier notice of violation. The Order specifically stated: "All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment."

In bankruptcy court, both parties sought summary judgment. Torwico maintained that the obligation constituted a "claim" under the bankruptcy code and that the State's failure to file a timely proof of claim was fatal to the State's position that Torwico was responsible for the obligation. The State, however, argued that the claims involved were regulatory obligations, not bankruptcy claims, and that Torwico was obligated to remedy the violations addressed in the Order pursuant to state and federal law.

Turning our attention to the Supreme Court's analysis in *Kovacs,* we explicitly noted that this case was unlike *Kovacs* in that the State was not demanding that Torwico pay money to it, but rather was requesting it to take action to ameliorate an ongoing hazard. *Torwico Electronics,* 8 F.3d at 150. Next, we shifted our focus to the nature of the obligation imposed by the Order and concluded that it was not an order for breach of an obligation that gave rise to the right of payment. Specifically, we noted:

> The state here found that the seepage pit was a continuing problem that was leaking hazardous material into the surrounding environment.

> Thus, the state is not asserting a "repackaged claim for damages"; rather there is an ongoing and continuing threat and . . . an obligation on the part of the debtor to "ameliorate ongoing pollution emanating from accumulated wastes" . . . The state has no "right to payment" here. What it has is a right to force the debtor to comply with applicable environmental laws by remedying an existing hazard.

Id. (quoting *In re Chateauguay,* 944 F.2d 997, 1008 (2d Cir.1991)).[9]

Kovacs indicates, and *Torwico Electronics* implies, that a right of payment under the bankruptcy code is, essentially, an obligation to pay money. Thus, the issue we must decide is whether monetary payment is an alternative for the equitable remedy of seniority integration. *See Matter of Udell,* 18 F.3d 403, 407 (7th Cir.1994) ("[an] example of a 'claim' is a right to an equitable remedy that can be satisfied by an 'alternative' right to payment").

---

[9] In *Torwico Electronics,* we were persuaded by, and explicitly applied, the approach adopted by the Court of Appeals for the Second Circuit in *In re Chateauguay,* 944 F.2d 997 (2d Cir.1990). In that case, the court addressed the issue of what constituted a claim in the context of the bankruptcy of an entity that operated hazardous waste sites. There, the court stated:

> Where an order imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, the order presents a claim if the government could have done the work itself and then sought reimbursement; under such circumstances there is a breach of an obligation that gives rise to a right of payment.

In re Chateauguay, 944 F.2d at 1008.

The district court answered this question affirmatively, and we agree.

We begin our analysis by noting that here, when ALPA filed its proof of claim in bankruptcy court, it enumerated the claim as one for money damages, in addition to specific performance, arising out of the underlying LPP labor arbitration dispute. Indeed, in its supplemental pre-hearing statement filed at the arbitration, ALPA specifically noted that it sought "damages in the form of back pay and front pay against . . . Continental . . . in addition to integrated pilot positions." This is not the end of our inquiry, however. Consistent with the analyses in *Kovacs* and *Torwico Electronics*, we are compelled to examine the nature of the remedy sought and to ascertain whether it can give rise to a right of payment. We conclude that it does.

Unlike the obligation at issue in *Torwico Electronics*, seniority integration is not a remedy tailored to enforce compliance with any federal or state laws or regulations.

The source of the remedy is a provision contained in an agreement. By its contractual nature, it is clear that the remedy was not created to enforce compliance with any particular mandate. Rather, by its terms, seniority integration is a discrete remedy, specifically created to protect a group of employees.[10] Thus, the remedy is a vehicle

---

[10] The LPPs specifically state:

> Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by [a] proposed merger. . . .

(Labor Protective Provisions, section 1).

by which to provide a benefit or compensation to individuals who are covered by the explicit terms of the agreement and who, by the agreement's terms, are entitled to enforce the remedy.

Although the collective bargaining agreement is silent as to the remedy following a breach of the agreement, it is reasonable to conclude that a "corollary right to payment of liquidated damages" would flow from a breach giving rise to the equitable remedy under the LPPs. *See Matter of Udell,* 18 F.3d at 408 (holding that a right to an equitable remedy for breach of performance is a claim if the same breach also gives rise to a right of payment with respect to the equitable remedy or if the right to payment is an alternative to the right to an equitable remedy). *See generally Chauffeurs, Teamsters, Etc. v. Terry,* 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (claim based on breach of a collective bargaining agreement is comparable to a breach of contract claim for which a legal award of money damages in the form of back pay is permitted); *Stewart v. KHD Deutz of America Corp.,* 75 F.2d 1522 (11th Cir.1996) (breach of [collective bargaining claim] claim is most analogous to a claim for breach of contract). The Court of Appeals for the Ninth Circuit's opinion in *Van Waters & Rogers, Inc. v. Int'l Brotherhood of Teamsters,* 913 F.2d 736 (9th Cir.1990), is instructive.

In that case, the court upheld an award of monetary damages for breach of a contract mandating seniority integration. There, Van Waters, a seller and distributor of chemicals, purchased its competitor, McKesson. Pursuant to the acquisition, Van Waters agreed to assume the terms and conditions of a collective bargaining agreement that

existed between McKesson and its employees' union, Local 70. Although the collective bargaining agreement contained a seniority integration clause triggered by a purchase or sale of McKesson, Van Waters refused to honor the terms of the clause after the purchase was complete. Accordingly, Local 70 filed a grievance based on Van Waters' failure to integrate the seniority of the former McKesson employees with Van Waters' seniority list.

Arbitration of the dispute was complicated by two additional factors. First, Van Waters maintained a collective bargaining agreement with another union, Local 287. Second, the collective bargaining agreement between Local 70 and McKesson/Van Waters contained a clause precluding the arbitrator from determining any jurisdictional dispute arising between Local 70 and any other union. The effect of the latter factor was that any ruling on a jurisdictional dispute would be outside of the scope of the arbitrator's authority. As seniority integration of Local 70's employees would affect the seniority of Van Waters' employees and create a potential conflict between the two unions, resolution of the dispute implicated the arbitrator's authority to resolve the dispute.

At the arbitration hearing, the arbitrator granted Local 70's grievance demanding that the seniority of the former McKesson employees be considered as integrated. However, the arbitrator declined to enforce seniority integration to avoid any jurisdictional dispute. Instead, the arbitrator ruled that the employees would receive damages for any wages and other benefits lost due to Van Waters' failure to consider their seniority. In so ruling, the arbitrator noted that the Local 70 agreement contained a

provision that permitted the recovery of damages by employees arising out of an employer's failure to require a purchaser to assume the obligations of the collective bargaining agreement. The Ninth Circuit upheld the arbitrator's award, concluding that the arbitrator properly fashioned a monetary award to the former McKesson employees "for the breach of the terms of Local 70's collective bargaining agreement." *Id.* at 742.

Van Waters illustrates that a monetary damage award can be enforced as an alternative to, or can arise with respect to, the equitable remedy of seniority integration. The award is not cumulative, nor does it address a separate remedial concern. Rather, it serves as a substitute for the performance of an equitable remedy that cannot otherwise be enforced. *See Van Waters*, 913 F.2d at 741 ("if violated, [the seniority rights provided under the collective bargaining agreement] could be remedied by an award of damages rather than specific performance.").

We find support for the proposition that monetary awards are a viable alternative to the equitable remedy of seniority integration in wrongful discharge cases where we have enforced awards of monetary damages in lieu of reinstatement. Much like reinstatement, seniority integration is a "make whole" remedy, the purpose of which is to restore the employee to the economic status quo that would exist but for the employer's conduct. *See Franks v. Bowman Trans. Co.*, 424 U.S. 747, 766 (1976).

Although we have recognized that reinstatement is the preferred remedy to address cases of wrongful discharge, we have enforced monetary awards as a viable

alternative where reinstatement is impractical. *See Maxfield v. Sinclair International,* 766 F.2d 788 (3d Cir.1985) (front pay is an appropriate alternative to reinstatement where the relationship between the parties may be so damaged by animosity that reinstatement is impracticable and the remedial purposes of the statute would be frustrated if front pay were not available as an alternative remedy); *Goss v. Exxon Office Systems Co.,* 747 F.2d 885 (3d Cir.1984) (same); *see also Ellis v. Ringgold School District,* 832 F.2d 27 (3d Cir.1987) (reinstatement may be denied when animosity between the parties makes such remedy impracticable). *Cf. Squires v. Bonser,* 54 F.3d 168 (3d Cir.1994) (special circumstances indicating that tensions between the parties exceed those which normally accompany reinstatement or indicating "irreparable" animosity among the parties involved justifies denial of reinstatement).[11] Similar to the conditions that can result from the

---

[11] *Squires* is distinguishable. That case involved an employee who challenged the district court's failure to direct reinstatement to his former position after a jury sustained a First Amendment constitutional challenge to his employer's failure to reappoint him. Reversing the district court's decision not to reinstate the employee, we stated, "[t]he fact that reinstatement might have disturbing consequences, revive old antagonisms, or breed difficult working conditions usually is not enough to outweigh the important first amendment policies that reinstatement serves [absent] probable adverse consequences[that] weigh so heavily that they counsel the court against imposing this preferred remedy." *Squires,* 54 F.3d at 175 (quoting *Banks v. Burkich,* 788 F.2d 1161, 1165 (6th Cir.1988)). Thus, it is clear that our decision to remand with instructions to reinstate the appellant was driven by the constitutional nature of the claims and the compelling need to enforce reinstatement to remedy the violation. As the claims here do not involve

enforcement of reinstatement, disruption to the work environment, irreparable damage to work relationships, and hostility and animosity are all very probable conditions that can result from the enforcement of seniority integration. Considering the similarity in purpose between the two remedies, the rationale underlying the enforcement of an alternative remedy to fulfill their remedial purposes, and the similarity in the impracticality of enforcing the remedies under particular circumstances, we are certain that a money damage award is an appropriate alternative to seniority integration.

Moreover, we are convinced that the particular circumstances of this case might make the enforcement of the equitable remedy of seniority integration impractical such that an alternative money damage award would be appropriate. The seniority integration sought by the LPP Claimants and the Group of 31 could potentially result in the displacement of many Continental pilots. Such displacement has the potential to create an environment rife with hostility and low employee morale, not to mention a detrimental effect on employer-employee relations.[12] The

---

constitutional concerns, we cannot conclude that any remedy short of seniority integration will not suffice to remedy the alleged violation.

[12] We note that nothing about the imposition of monetary damages as a substitute for seniority integration frustrates the remedial purpose of the LPPs. *Cf. Franks*, 424 U.S. at 771 (in a Title VII case, "the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.' "). Indeed, the LPPs set forth as its

circumstances indicate that seniority integration would not be a feasible remedy and that an alternative remedy of monetary damages would be appropriate. Therefore, we conclude that the right to seniority integration gives rise to a "right of payment" such that the remedy constitutes a "claim" dischargeable in bankruptcy.

We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LPP dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, we hold that any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the right to seniority integration is satisfiable by the payment of money damages.

D. *Arguments of Appellee/Cross-Appellant Continental*

1. *Dissolution of the Injunction*

Continental challenges the district court's ruling vacating the injunction against the continuation of the Kasher Arbitration on two grounds. First, it argues that contrary to the district court's conclusion, the permanent

---

scope and purpose "to provide for compensatory allowances to employees who may be affected by the proposed merger of" the carriers. *See* discussion *supra* note 2. An award of monetary damages is consistent with the articulated scope and purpose, and is therefore appropriate.

injunction, imposed by the Plan of Confirmation, complied with the mandate of Rule 65(d).[13] Next, it contends that if the permanent injunction did not comply with Rule 65(d), the statutory injunction referenced in the bankruptcy court's confirmation order survived the permanent injunction and is valid. We need not decide whether the permanent injunction failed to comply with the mandate of Rule 65(d). We conclude that even assuming that the statutory injunction survived the permanent injunction and is not subject to the requirements set forth

---

[13] Section 12.19 of the plan of reorganization provided:

> ¶ 1219. *Injunction Relating to Eastern Claims.* This Joint Plan permanently enjoins, and the Confirmation Order shall constitute and provide for a permanent injunction against, any Person or entity, including without limitation, (i) any present or former employee of Eastern . . . (ii) any labor union or collective bargaining representative acting or purporting to act on behalf of any such employees or former employees . . . from commencing, conducting or continuing any suit, arbitration, action or other proceeding in any place or forum against any Debtor, . . . This injunction shall apply, without limitation, to any suit, arbitration, action or proceeding.

(Debtors' Revised Second Amended Joint Plan of Reorganization, § 12.19).

Federal Rule of Civil Procedure 65(d) states:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . .

Fed.R.Civ.P. 65(d).

in Rule 65(d), Continental's failure to reject the collective bargaining agreement consistent with the mandate of section 1113 of the Code renders the injunction invalid.

The Confirmation Order issued by the bankruptcy court specifically incorporated the statutory injunction prescribed by the bankruptcy code. The order states:

> In accordance with section 524 of the Bankruptcy Code . . . this Order:
>
> (ii) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt or Claim as a personal liability of the Debtors. . . .

(Findings of Fact, Conclusions of Law and Order Confirming The Debtors' Revised Second Amended Joint Plan of Reorganization).

Assuming, as the district court did and as Continental argues, that the section 524 statutory injunction is not subject to the requirements of Rule 65(d), we conclude that the district court properly vacated the injunction against the Kasher Arbitration. Section 1113 of the Code provides:

> (a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

11 U.S.C. § 1113(a). The provision outlines the procedure that a debtor or appointed trustee must follow to successfully reject a collective bargaining agreement, including, but not limited to: (1) the submission of a proposal to

an authorized representative of the employees affected by the terms of the agreement prior to the filing of an application to reject the agreement, 11 U.S.C. § 524(b)(1)(A); and (2) good faith attempts to reach a "mutually satisfactory modification" of the agreement, 11 U.S.C. § 524(b)(2).

The intent behind section 1113 is to preclude debtors or trustees in bankruptcy from unilaterally terminating, altering, or modifying the terms of a collective bargaining agreement without following its strict mandate. *In re Ionosphere,* 922 F.2d at 989-90. Moreover, the provision operates to preclude the application of other bankruptcy code provisions to the advantage of debtors and trustees to permit them to escape the terms of a collective bargaining agreement without complying with the requirements of section 1113. *See id.*

Continental does not dispute that it did not follow the requirements set forth in section 1113 to reject the collective bargaining agreement. Instead, Continental suggests that the imposition of the injunction was consistent with the bankruptcy court's authority to determine the administrative priority and status of the bankruptcy claims. Thus, it argues, section 1113 cannot divest the bankruptcy court of jurisdiction to exercise this authority and impose the injunction. We disagree.[14]

---

[14] We have not been required previously to address the applicability of arbitration under collective bargaining agreements when the employer is in bankruptcy, although the issue was raised in a case we decided last year. *See Antol v. Esposto,* 100 F.3d 1111, 1121 n. 4 (3d Cir.1996) ("[W]e need not decide that interesting issue here."). This case, however, requires us to do so.

The injunction allowed Continental to avoid its obligation to arbitrate the merger dispute under the LPPs. In *In re Ionosphere*, the Court specifically held that the application of the section 362 automatic stay provision to effectuate this result in the absence of the debtor's compliance with the requirements of section 1113 was impermissible, as "its application would allow a debtor unilaterally to avoid its obligation to arbitrate." *In re Ionosphere*, 922 F.2d at 993. Here, the enforcement of the statutory injunction in the face of Continental's failure to follow the requirements of section 1113 is no different. As the enforcement of the injunction would have the effect of permitting Continental to escape its duty to arbitrate under the collective bargaining agreement, we decline to enforce the statutory injunction in the absence of Continental's compliance with the requirements to reject the collective bargaining agreement.[15]

---

[15] Despite our conclusion that failure to comply with section 1113 bars an injunction of the arbitration, we reject the Claimants' contention that the substitution of a monetary damage award, in lieu of seniority integration, is not permitted under section 1113 because it alters or modifies the terms of the collective bargaining agreement. The bankruptcy court's determination of the administrative priority and status of the claims was not based on an interpretation of the LPPs. Nor did it predetermine the appropriate remedy warranted under the LPPs, thus "nullifying" the agreement and infringing on the arbitrator's jurisdiction. Substitution of the equitable remedy in no way amounts to an alteration or termination of the terms of the collective bargaining agreement.

2. *Duty to Arbitrate*

Finally, we reject Continental's argument that it has no duty to arbitrate the LPP dispute. Throughout this litigation, Continental has premised its arguments on the assumption that it is bound by the LPPs and has a duty to arbitrate the LPP dispute. In so doing, Continental reaped enormous benefits: (1) it was able to obtain a ruling that the claim based on seniority integration could be treated as a right to payment in bankruptcy, satisfiable by a monetary award; and (2) in turn, it received backing from investors for its plan of reorganization, which was critical to plan confirmation by the bankruptcy court.[16] Now,

---

[16] It is apparent that Continental assumed this position in efforts to obtain judicial confirmation of its plan of reorganization. In its Motion for Partial Summary Judgment, Continental stated:

> 1. [Debtors] make this Motion For Partial Summary Judgment On Their Partial Objection to Claims Based On Certain Alleged Labor Protective Provisions Involving The Air Line Pilots Association, International ("ALPA") And Eastern Air Lines, Inc. ("Eastern") in order to ensure that they will be able to reorganize successfully and, more specifically, to satisfy a condition of the Investment Agreement dated November 9, 1992 ("Investment Agreement"), by and among [the investors] and the Debtors. In addition to monetary damages, these claims seek to require Continental to hire several thousand Eastern Air Lines pilots, which if granted would necessitate the displacement of an equal number of incumbent Continental pilots. Debtors seek in this Motion a legal determination that the "LPP Claims" . . . are, at best, dischargeable, prepetition general unsecured claims within the meaning of the Bankruptcy Code Section 101(5).

Continental maintains that there has been no determination that it is bound by the LPPs and that the case should be remanded to the district court for a determination on the merits of its duty to arbitrate the dispute.

In light of the overwhelming advantage that Continental derived from maintaining the position that it was bound by the collective bargaining agreement, and thus, had a duty to arbitrate the LPP dispute, we refuse to allow Continental to repudiate that representation and return to the district court to litigate the issue whether it is bound by the agreement. *See EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046, 1050 (3d Cir.1993) ("one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so . . . a reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations."). Accordingly, we conclude that Continental is bound by its prior representations that it has a duty to arbitrate the LPP dispute.

III.

For the foregoing reasons, we affirm the district court's decision in all respects.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Order Denying Petition for Rehearing,
rendered September 23, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-7028 and 96-7038

IN RE: CONTINENTAL AIRLINES,

Debtor

AIR LINE PILOTS ASSOCIATION

vs.

CONTINENTAL AIRLINES

LPP CLAIMANTS; EFFECTIVE DATE COMMITTEE,

Claimants

HONORABLE JOHN STONITSCH,

Trustee

LPP CLAIMANTS,

Appellant No. 96-7028

(Caption amended in accordance with
Clerk's Order dated 3/4/96)

IN RE: CONTINENTAL AIRLINES,

Debtor

AIR LINE PILOTS ASSOCIATION

vs.

CONTINENTAL AIRLINES

LPP CLAIMANTS; EFFECTIVE DATE COMMITTEE,

Claimants

HONORABLE JOHN STONITSCH,

Trustee

CONTINENTAL AIRLINES, INC.,

Appellant No. 96-7038

(Caption amended in accordance with Clerk's Order dated 3/4/96)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and MICHEL,* Circuit Judges.

The petition for rehearing filed by appellant, LPP Claimants, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

---

* Honorable Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation, whose vote is limited to panel rehearing only.

circuit judges in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT,

/s/ illegible
Circuit Judge

Date: Sep. 23, 1997

APPENDIX C

Excerpt from *In re Continental Airlines, et al.*,
No. 93-163 (D. Del. Nov. 29, 1995)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	
CONTINENTAL AIRLINES, INC. et al.,	
Debtors,	Bankruptcy Court Case Nos. 90-932 through 90-984
AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, and LPP CLAIMANTS,	
Appellants,	C.A. No.: 93-163, 93-164, 93-177, 93-178, 93-250, 93-255, 94-496
v.	
CONTINENTAL AIRLINES, INC. et al.,	Consol. 93-163 LON
Appellees.	

Stephen W. Spence, Esquire, Phillips, Goldman & Spence, Wilmington, Delaware, Attorney for Claimant-Appellant Air Line Pilots Association; Michael J. Isaacs, Esquire, Agostini, Levitsky & Isaacs, Attorney for Claimant-Appellant LPP Claimants.

Laura D. Jones, Esquire, Young, Conaway, Stargatt & Taylor, Wilmington, DE; Attorneys for Debtors-Appellees.

MEMORANDUM OPINION

November 29, 1995
Wilmington, Delaware

* * *

> [p. 41] adjudication of this dispute in the bankruptcy court would nullify effectively the arbitration clause in the collective bargaining agreement and would substitute the court's judgment for that of the arbitrator.
>
> The collective bargaining agreement expressly provides for arbitration as the method of dispute resolution.

Id. at 992. The bankruptcy court does not have jurisdiction to decide the merits of the LPP claims. *See* 28 U.S.C. § 157. Yet, exercise of that jurisdiction would abrogate the provision of the collective bargaining agreement that mandated arbitration. Therefore, the bankruptcy court should have allowed an arbitrator to determine the merits of the LPP claims against Continental.[30] This in no way restricts the bankruptcy court's authority to determine the priority of those claims. Any arbitration award would be, in accordance with the bankruptcy court's determination, a general unsecured pre-petition claim.[31]

---

[30] The court does not imply that an arbitrator should reach any particular decision. In fact, an arbitrator may decide not to reach a decision on the merits. *See, e.g., Seaboard Acquisition*, 1983 WL 35470 (C.A.B. December 15, 1983) (dismissing seniority integration petition for delay in bringing claim).

[31] The court realizes that the right to arbitrate the LPP dispute may be of limited practical utility to the LPP Claimants. Any award that might be granted by the arbitrator would be an unsecured pre-petition claim and may come after the assets of

The appropriate remedy under these circumstances is to vacate the injunction, which this court hereby orders. *See Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 353 F.2d

* * *

---

the bankruptcy estate have been wholly depleted. While there was some evidence in the record of a reserve of unallocated stock (D.I. 15, Exhibit I, pp. 25-26), there is no evidence that such a reserve still exists or that it would exist at the time such an arbitration award might be granted.

APPENDIX D

L. D. Schulte Grievance, Eastern Air Lines System Board of Adjustment, ALPA Case No. 1-86

Before the

Eastern Air Lines Pilots System Board of Adjustment

EASTERN AIR LINES, INC.	)
– and –	)
THE AIR LINE PILOTS ASSOCIATION	)
L. D. Schulte Grievance ALPA Case No. 1-86	)

The L. D. Schulte grievance was heard on April 19-21, May 11-12, June 14, and November 15-16, 1988, at Miami, Florida, by the 5-member Pilots System Board of Adjustment composed of Company Members Noel R. Honohan and William R. Tegtman, Association Members J. P. Distel and George T. Jehn (Larry C. Wells sat with the Board in the place of George T. Jehn as Association Member for the June 14 and November 15-16 sessions), and Neutral Referee Frank Elkouri.

Appearing for the Company were David P. Callett, Mark J. Schwartz, and Martin A. Soll, and appearing for the Association was James L. Linsey (Russell Hollander participated in the Association's brief; William A. Roberts appeared for the Association at the November 15 session, and with James L. Linsey at the November 16 session).

Briefs were mailed by both Parties on January 20, 1989 (the Association mailed a corrected brief on January 24).

The Board met at Miami, Florida, on February 7, 1989, for discussion of the case in executive session. It was then understood that the Referee would prepare a proposed decision, and that the Board Members would have two weeks (from the date of the letter transmitting that proposed decision) in which to request another executive session.

The Neutral Referee mailed copies of the proposed decision to the Board Members on March 4, 1989. United States Bankruptcy Court jurisdiction over Eastern Air Lines ensued on March 9, 1989, and on September 11, 1989, that Court authorized the System Board to issue its decision in the present case. No additional executive session was thereafter desired by either Party.

OPINION BY NEUTRAL REFEREE

A handwritten document hastily drafted by the Company as its bargaining Proposal No. 7 and signed just a few hours later by the Company and ALPA as their agreement under date of February 23, 1986, has been held by the U.S. Court of Appeals, Eleventh Circuit, to constitute in fact a binding collective agreement between Eastern and ALPA in behalf of Eastern's pilots. That document which hereafter in this Opinion is often referred to as "the February 23 Agreement," contains the language or provision which is now before the Board for interpretation or construction in the present case. In addition to holding the February 23, 1986, document to constitute a binding collective agreement between the Parties, the Court of Appeals held also that the Eastern Air Lines Pilots System Board of Adjustment "will be charged with

determining the contours of" certain disputed "provisions contained in the February 23 Agreement (grievances had been filed on the disputed provisions).[1] In the present case one of those disputed provisions is before the Board for final resolution.

In addition to other facts which will be noted in the course of the present Opinion, some of the pertinent facts as found and collated by the Court of Appeals in its decision may be noted now. The Court of Appeals explained that:[2]

> Eastern and its unions together faced a serious dilemma in the early weeks of 1986. Eastern's above-industry labor costs contributed substantially to its deteriorating financial condition, and the airline realized that if it could not reduce those costs by securing wage concessions from ALPA, the machinists' union, and the flight attendants' union, it would be compelled to opt either for bankruptcy or loss of its independent. Neither alternative appealed to Eastern or to its pilots, who were then engaged in rocky negotiations with the carrier over a new collective-bargaining agreement. While an agreement with ALPA alone would not prevent a sale or bankruptcy, the lack of a contract would probably cause one or the other, and would leave the pilots unprotected after such an event occurred. Reaching some sort of agreement was thus of critical importance to both parties.

---

[1] Eastern Air Lines v. Air Line Pilots Association, 130 LRRM 2284, 2291 (CA 11, 1988).

[2] Id. at 2285-2286.

Collective-bargaining negotiations between Eastern and ALPA, under the eye of the National Mediation Board (NMB), began in December of 1985. In late January 1986, after an impasse, the NMB declared a mandatory thirty-day "cooling off" period under the Railway Labor Act (RLA), after which both the pilots and the carrier could engage in "self-help." Self-help for the pilots entails striking the airline; the airline avails itself of self-help by unilaterally implementing the terms of its final offer. The cooling-off period was to end on February 26.

Intense negotiation continued during the cooling-off period. In the final days of the period, Eastern was approached by a potential suitor, the Texas Air Corporation, Eastern seriously considered accepting Texas Air's offer if it could not resuscitate itself by slashing its labor costs. The offer was due to expire at midnight on February 23, 1986, yet by the 23rd, Eastern and ALPA had not been able to agree to a new contract.

Compounding the external pressure to reach an agreement imposed by the potential of a sale or bankruptcy, the pilots voted on February 21 to strike the airline at the end of the cooling-off period. On February 23, then, the negotiating parties began to work feverishly in the face of the looming deadline, while Texas Air apparently agreed to extend its offer for a few more hours. Wide areas of disagreement still separated the parties.

Sometime in the evening of February 23, ALPA requested Eastern's final offer, and to the ALPA team Eastern offered "EAL No. 7," a handwritten four-page document peppered with

"buzzwords" and loose phrases. The terms of EAL No. 7 summarized concepts that the negotiating parties had been discussing over the course of the talks. After some inconclusive haggling, ALPA negotiators submitted the document to the Eastern Air Lines Master Executive Committee (the "MEC"), ALPA's local governing body, without recommending that the draft be ratified. The MEC questioned its negotiators about various provisions of the document, and the negotiators, aware that they did not completely understand EAL No. 7, were not able to answer every question posed them. The MEC initially rejected EAL No. 7. Then, in the early hours of February 24, informed that it would have to ratify the document or steer Eastern toward bankruptcy or toward a sale, the MEC ratified. Following the ratification, Eastern tendered EAL No. 7 for the signature of the relevant ALPA officials, who then signed the document. Eastern's officials has already signed EAL No. 7. Eastern's Vice President then substituted the word "AGREEMENT" for "PROPOSAL" as the title of the document. On February 25, Eastern and ALPA executed a signature page in blank.

Despite the apparent success in reaching an agreement with ALPA Eastern was unable to reach an agreement with its machinists' union. Eastern was therefore sold to Texas Air on February 24.

* * *

From the end of February, the parties attempted to flesh out the terse phrases contained in EAL No. 7. As early as February 25, if not sooner, the parties realized that certain

> important terms were unclear. While they never were able to agree on precise definitions for six key terms, other parts of the agreement were not in dispute.
>
> * * *

One of the "key terms" which the Court states the Parties "never were able to agree on precise definitions for," is the February 23, Agreement term which is before the Board in the present case. As quoted by the Court from the handwritten February 23 Agreement, this term states: "2. LPP's & Takeover Similar to TWA – need to work out between EAL/ALPA legal counsel".[3] The Court of Appeals specifically indicated that the just-quoted provision is an "unclear" term of the February 23 Agreement.[4] The Board now must determine what, under the evidence of record in this case, is the most reasonable construction to be given to this unclear contractual reference to LPP's. At least it is now in order for the Board to make that determination unless the Board finds merit either (1) in the Company's contention that the present grievance "is not ripe for decision," or (2) in the Company's contention that the "grievance is untimely."[5]

Actually, six basic questions or contentions are treated and answered below in this Opinion (but they are not necessarily considered in any particular order). They concern:

---

[3] Id. at 2286, fn 1.

[4] Id. at 2286. Subsequently the Court again acknowledged "the lack of clarity in" the term. Id. at 2290.

[5] Co. Brief, pp. 39-40.

1) The Company's contention that the grievance "is not ripe for decision."

2) The Company's contention that the "grievance is untimely."

3) The Company's basic position that the February 23, 1986, Agreement between the Parties provides LPP protection for pilots only as specified in Sections 3 and 13 of the Allegheny-Mohawk LPP's, and that even those Sections "would become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier."

4) ALPA's basic position that the reference to LPP's in the February 23 Agreement incorporates the full package of Allegheny-Mohawk LPP's.

5) ALPA's position in the alternative that if the claim to the full package of Allegheny-Mohawk LPP's is rejected, then the Eastern pilots are entitled to "all of the protections of the TWA LPP's."

6) The question of what is the most reasonable construction of the reference to LPP's in the February 23 Agreement if the contentions of ALPA and the Company concerning that reference are all rejected.

Regarding the Company contention that the grievance "is not ripe for decision," the Company urges that a ruling on the merits of the grievance would constitute an

advisory opinion or declaratory judgment. The Company explains:[6]

> "Assuming *arguendo* that ALPA is correct and that the parties agreed to Allegheny-Mohawk LPP's, there is, nevertheless, no dispute for this Board to decide. Allegheny-Mohawk LPP's provide protections and compensation for employees affected by the merger of two airlines. Thus, unless Eastern has merged with another carrier, the issue presented by ALPA's grievance is not ripe for decision. As the Chairman observed, it is not within the Board's jurisdiction to determine [in the present case] whether there has been a merger between Eastern and another airline. Accepting this, and the fact that Eastern has not announced a merger with another airline and that no administrative or judicial body has concluded that such a merger has taken place, no employee can argue that he has been affected by a merger. Therefore, the controversy before the Board is not ripe."

Even though the question whether there actually has been any merger is not before the Board in the present case, the Board's ruling on the merits in the case will not constitute merely an advisory opinion or declaratory judgment. An important issue is properly before the Board and is ripe for decision on the merits. That issue concerns the scope of LPP protection to which the pilots are entitled as a matter of contractual right and the concomitant scope of Company LPP obligation under the February 23 Agreement.

---

[6] Ibid, footnote and citation omitted. Also see Co. Brief, p. 4.

The grievance in the present case is dated August 6, 1986, and contains the following statement as to what is alleged:[7]

> "[T]he undersigned hereby files this MEC grievance based on the Company's disclosure that it will refuse to recognize 'standard' Labor Protective Provisions (Allegheny-Mohawk) as provided in the current EAL/ALPA Agreement dated February 23, 1986."

The Company's belief that the grievance is not ripe for decision by the Board possibly has resulted in part at least from the Company's unduly narrow view regarding what the grievance statement inherently seeks. In this connection, one of the Company's contentions in this case is that "The scope of ALPA's grievance is limited and ALPA should not be permitted to expand the scope of its grievance."[8] The Company urges that, if the Board does rule on the merits, "The Board should limit its ruling to the question which ALPA's grievance raises: whether, in the February 23, 1986 Agreement, the parties agreed to Allegheny-Mohawk LPP's."[9] Although the grievance statement does call, of course, for an affirmative or negative answer to the question whether the Parties agreed to the Allegheny-Mohawk LPP's, the grievance statement inherently seeks more than that.[10] The fact that the grievance statement does inherently seek more is relevant not

---

[7] Joint Ex. #1, Submission Ex. # 1.

[8] Company Brief, p. 37.

[9] Id. at 39.

[10] Even if the grievance statement did only seek a ruling on the question whether the Parties, in the February 23 Agreement, agreed to the Allegheny-Mohawk LPP's, the case arguably

only to the Company's contention that ALPA has attempted to expand the scope of its grievance, but is relevant also to the contention that the grievance is not ripe for decision.

In substance and import, if not in literal words, the grievance asserts: (1) the right of pilots to know the general scope of LPP protection they have as a matter of contractual right under the February 23 Agreement; (2) the right of pilots to insist that the Company likewise be cognizant of that general scope of LPP protection and the concomitant Company LPP obligation, so the Company may be prepared to fulfill the obligation as it may become due consequent to future developments; and (3) the right of pilots to insist that the Company not deny the existence of pilot LPP protection of the general scope that actually exists under the February 23 Agreement.

One of the very important benefits inherent in some types of rights comes from merely knowing, without more, that the rights are there. Few understanding persons would deny that an exceedingly important benefit which comes from having life insurance, for example, is the assurance and peace of mind that comes merely from knowing that it is there. LPP's could be considered, in a sense, to be a type of life or casualty insurance. But in any event, LPP's are definitely insurance of some type. The

---

would still be ripe for decision. This is so because knowing whether they have a contractual right to the full package of Allegheny-Mohawk LPP's is of such obvious and great importance to the pilots that it would be unreasonable to deny them the answer until a merger has occurred or allegedly occurred.

pilots are entitled to know whether they have contractual LPP's; and if they do have LPP's, the pilots are entitled to know what contractual provisions will apply to control the scope of that protection. Moreover, the pilots are entitled, as a matter of right, to insist that the Company also know these things to enable it to evaluate its contractual LPP obligation. This is essential for the sound managerial planning and decisions critical to the fulfillment of pilot LPP protection.

Thus, the present grievance must be considered ripe for decision. Or at least this is so unless any decision concerning the general scope of LPP's under the February 23 Agreement would be too speculative at this time. It would not be too speculative. Information for resolving the grievance is as much available and as adequate now as it would be later. A ruling on the merits will be no more speculative now than it would be later. The contention that the grievance "is not ripe for decision" is rejected. And as now will be explained, the contention that the "grievance is untimely," is also rejected.

Much of what has been said above concerning the "not ripe for decision" contention, is relevant also to the contention that the "grievance is untimely." That is, the right of pilots to know the general scope of their contractual LPP protection, and their right to insist that the Company likewise know, and their right to insist that the Company not deny the existence or general scope of the contractual LPP protection, are all continuing rights: each and every day that these rights are denied to the pilots by

the Company, their right to protest by grievance arises anew.[11]

But even apart from the fact that the grievance by nature involves a continuing violation, another consideration in rejecting the contention that the grievance is untimely, is the fact that discussions on LPP's were ongoing between the Parties through the spring and much of the summer of 1986. In the latter regard, ALPA states:[12]

> "ALPA first learned that Eastern had foreclosed any possibility of providing Allegheny-Mohawk LPP's on July 10, 1986, when Eastern amended its complaint [in its court action] to assert that no valid collective bargaining agreement between ALPA and Eastern existed. Prior to that time ALPA and Eastern had been discussing ways to resolve their differing interpretations of the contractual language including, but not limited to, LPP's. These discussions occurred on an ongoing basis from February up to and including July. It was not until July 10, 1986 when Eastern asserted that no valid collective bargaining agreement existed that ALPA realized those discussions were futile. ALPA promptly filed the present grievance on August 6, 1986 well within the 45 day time limit prescribed by Section 30 of the ALPA-Eastern Collective Bargaining Agreement.

---

[11] ALPA, too, believes the case involves a continuing violation, but ALPA states a different rationale for the belief. ALPA Brief, pp. 19-21. Since the rationale stated hereinabove shows that a continuing violation is involved, the rationale stated in ALPA's Brief is not evaluated here.

[12] ALPA Brief, pp. 17-18, Transcript citations omitted.

> "In similar circumstances, arbitrators have found that the time limit to file a grievance does not begin to run until informal attempts to resolve the dispute break down. [ALPA's footnote here states, with support by a Transcript citation, that "This is entirely consistent with the parties practices at Eastern."] These decisions reason that so long as there may be a chance to resolve the dispute short of the formal arbitration process, informal discussions should be encouraged."

Both in its Brief in the present case and in its position in the court action, the Company itself has affirmed that there were ongoing discussions between the Parties on LPP's and other key issues at least until August 1986.[13]

The Company denies that the ongoing discussions had the effect of tolling the running of contractual time limits. The Company declares that "at no point in these discussions was there an agreement to extend the 45-day

---

[13] Company Brief, p. 43, referring to "the discussions held by the parties from March through July 1986"; Eastern Air Lines v. Air Line Pilots Association, 130 LRRM 2284, 2286 (CA 11, 1988), where the Court stated: "In August, ALPA attempted to invoke adjustment-board procedures to resolve three more disputes under EAL No. 7, concerning the 'labor protective' term, medical and dental benefits, and 'pseudo' contributions to the pilots' retirement plan. In September, Eastern again amended its complaint, and alleged that

> Contrary to the assertions of [ALPA], no agreement presently exists between ALPA and Eastern with respect to any of the matters referred to above. On the contrary, *these* and other *matters have been the subject of ongoing*, but to date unsuccessful collective bargaining *negotiations* * * * ." (emphasis added)

time limits and Eastern never gave any indication that it would change its position on LPP's."[14] But neither did the Company give any indication that it would not change its position on LPP's; until the Company renounced the Agreement to the court, it had never given clear notice that the ongoing discussions and the possibility of settlement of the LPP issue was ended. Although the waiver of contractual time limits should not be lightly implied, a specific and express understanding by the Parties is not the only possible basis for tolling their running (unless the contract expressly provides otherwise). As stated hereinabove, another consideration in rejecting the contention that the present grievance is untimely, is that there were ongoing discussions between the Parties on LPP's.

Turning now to the merits of the grievance, the Board must determine what, under the evidence of record in this case, is the most reasonable construction to be given to the reference to LPP's in the February 23 Agreement. As we have noted, that reference is contained in the following portion of the Agreement: "2. LPP's & Takeover Similar to TWA – need to work out between EAL/ALPA legal counsel".

The following statement by the Company indicates the basic position it has taken as to the meaning or significance of the reference to LPP's in the February 23 Agreement:[15]

---

[14] Company Brief, p. 43.

[15] Co. Brief, p. 2, emphasis added. Co. Brief, p. 16, again asserts the limitation that pilot seniority rights would be

> "The contested language 'LPP's & Takeover Similar To TWA' is clear and unambiguous. The language is susceptible to only one interpretation – Eastern proposed and ALPA agreed to TWA LPP's (Sections 3 and 13 of the Allegheny-Mohawks LPP's), *which would become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier.*"

Another statement by the Company reflects its understanding regarding ALPA's position in the case:[16]

> "The disputed language 'LPP's & Takeover Similar to TWA' is clear and unambiguous. Interestingly, both Eastern and ALPA agree on this. Yet the parties believe that the disputed language has a different meaning. ALPA reads the language as if there is a period after the acronym 'LPP's' and the phrase 'Similar to TWA' modifies only the word 'Takeover' and not the acronym 'LPP's.' ALPA contends that the acronym 'LPP's' standing alone can only refer to Allegheny-Mohawk LPP's."

That ALPA in fact does read the disputed language as if there is a period after the term "LPP's," making it much more certain that the term does stand alone, seems implicit in ALPA's own statement of its basic position, which is "that the pilots bargained for and received standard, i.e. Allegheny-Mohawk, LPP's."[17]

---

protected by Sections 3 and 13 only "is the event there were a merger of" seniority lists.

[16] Co. Brief, pp. 14-15, footnote omitted.

[17] ALPA Brief, p. 1. In claiming "standard" or "Allegheny-Mohawk LPP's," ALPA means the full package of Allegheny-Mohawk LPP's.

It is not necessary for the Board to decide in the present case whether the term or acronym "LPP's" should be treated as standing alone, or whether it should be treated as being modified by the words "Similar to TWA." This is so because its meaning would be uncertain in either event. Whether the term is viewed as standing alone, or as being modified, either way the Board still would be forced to rely upon bargaining history and/or other extrinsic evidence in order to determine what is the general scope of LPP protection to which the pilots are entitled as a matter of contractual right under the reference to LPP's in the February 23 Agreement. Standing alone, the term "LPP's" is too general to be clear and certain – while the Allegheny-Mohawk LPP's promulgated by the Civil Aeronautics Board initially may have been the only known type of LPP's, other varieties subsequently did come into use. And if the term "LPP's" were viewed as being modified by the words "Similar to TWA" in the February 23 Agreement, the general scope of LPP protection under that Agreement still would be uncertain – to be "similar to" is not the same as being "identical with." But even if "similar to" were considered to be the same as "identical with," that might not provide any easy or automatic answer. It might be difficult to apply for Eastern pilots LPP's identical with all of the LPP's to which TWA pilots are entitled under the January 3, 1986, letter of understanding between ALPA, Trans World Airlines, and Carl C. Icahn and his affiliates (the letter of understanding is referred to elsewhere in this Opinion as

the "TWA Agreement").[18] In the latter regard, the TWA LPP's do not appear to be as readily adaptible [sic] as the Allegheny-Mohawk LPP's for use in mergers between other carriers.[19]

---

[18] The letter of understanding was introduced into evidence in the present case as ALPA Exhibit #4.

[19] Unlike the package of LPP's contained in the TWA Agreement, the Allegheny-Mohawk LPP's are stated in such terms as to be usable with little or no modification for other airline mergers. The Allegheny-Mohawk LPP's in fact were imposed by the Civil Aeronautics Board for other airline mergers, with the result that they sometimes are referred to as "standard" LPP's. In the latter regard, the U.S. Department of Transportation, in a case related to the present case, explained on January 9, 1989, that:

> "The standard LPP's sought by the labor parties are those drafted by the Civil Aeronautics Board * * * in *Allegheny-Mohawk Merger*, 59 CAB 22, 45-49 (1972), and applied by the Board in later cases with virtually no changes. The standard LPP's would provide financial benefits for employees whose jobs were lost, displaced, or moved as a result of the transaction and would require a fair integration of the carriers' seniority lists." Remanded Texas Air-Eastern Acquisition Case, Docket 44346, Final Order 89-1-11, p. 2 fn. 1 (DOT, 1989).

In the latter Order (at 15-16) the DOT denied "the requests that standard labor protective provisions be imposed"; instead, the DOT "as a condition upon the approval * * * of Texas Air Corporation's acquisition of Eastern Air Lines," imposed a stipulation by Texas Air Corporation and Eastern Air Lines that certain possible future events would not extinguish "the Labor Protective Provisions which may be contained in any Eastern Air Lines collective bargaining agreement." For more on this, see ALPA Brief, pp. 3-4, where ALPA also explains, to this Board, that: "ALPA's simultaneous pursuit of Government-ordered LPP's is not inconsistent with its position that standard

Notwithstanding any difficulty that may be involved in an attempt to use the TWA LPP's in toto for Eastern's pilots, ALPA does request in its Brief (p. 36) that the Board "order Eastern to recognize and abide by standard LPP's in the February Agreement. In the alternative, this System Board should order Eastern to recognize and abide by all of the protections of the TWA LPP's in its February Agreement." In this regard, ALPA in its Brief (p. 35) expresses its belief that:

> "The TWA Agreement, while somewhat different from standard Allegheny-Mohawk LPP's, provides genuine protections through the preservation of assets and by other controls. * * * Paragraph 10 of the TWA Agreement specifically provides for the preservation of TWA's aircraft fleet and level of operations, prohibits the full or partial merger of the airline without the consent of ALPA, and attaches as Appendix B thereto Sections 1, 2, 3, and 13 of Allegheny-Mohawk LPP's. * * *
>
> "In the negotiations leading to the February Agreement, Eastern made no reference at all to any LPP provisions in the TWA Agreement * * * much less initiated any discussion to delete or modify those provisions. Therefore, if Eastern persists in its argument that it agreed to LPP's similar to TWA, this Board should closely examine paragraph 10 and related provisions of the TWA Agreement and treat Eastern to what it

---

LPP's are included in the February Agreement. Indeed, ALPA may feel much more secure cloaked with a Government order policed by the United States than with provisions of a collective bargaining agreement which was challenged in lengthy litigation by Eastern."

> requests and so richly deserves: labor protective provisions, including fleet asset and operational level guarantees and merger restrictions, which approximate those contained in paragraph 10 and related provisions of the TWA Agreement."

However, even apart from any other consideration standing against acceptance of ALPA's request in the alternative for "all of the protections of the TWA LPP's," a sufficient reason for rejecting such a request is that the record in the present case offers virtually no indication, if any at all, that *either* Eastern or ALPA actually had even the slightest thought of incorporating all of the TWA Agreement LPP's into the February 23 Agreement. An order by this Board for such a result would in no sense be the most reasonable construction which could be given to the reference to LPP's in that Agreement – any such order would deviate much too far from the intent or expectation of either Party when the February 23 Agreement was adopted.

But neither does the record in this case justify any conclusion that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's.

Space will not be devoted in the present Opinion to a detailed discussion of the evidence that has been submitted by the Company to show that the pilots knew or should be charged with notice that the Company in entering into the February 23 Agreement believed and expected that something considerably less than the full package of Allegheny-Mohawk LPP's was being contracted for. Rather, it suffices to state here that the Company in its Brief, with ample citation of evidence contained in

the Transcript and Exhibits, has discussed that evidence and has indeed shown that the pilots knew or should be charged with notice that the Company intended and believed that something considerably less than full Allegheny-Mohawk LPP's was being contracted for.[20]

Two factors that the Company places special reliance upon in the latter regard, are (1) that "ALPA's President, Henry Duffy, who signed both the TWA [A]greement and the Eastern Agreement, was present when Eastern's LPP proposal was made and at the MEC meeting which approved the proposal," and (2) that "Seth Rosen, ALPA's Director of Representation, brought the TWA LPP's to the attention of Alan Gibson, the Chairman of Eastern's Negotiating Committee."[21] Concerning the latter factor, the Company states that:[22]

> "After presenting copies of Eastern's Proposal No. 7 to ALPA's negotiators, Mr. Gibson read the language of that proposal and asked ALPA's negotiators if they had any questions. Receiving none, he assumed ALPA's negotiators understood Eastern's proposal. Mr. Gibson's

---

[20] See Co. Brief, pp. 3, 5-10, 12-13, 21, 26. Also see Tr. 316-317, 324, 326-327. Moreover, it is difficult to refute the Company's argument that: "Considering Eastern's dire financial condition on February 23, 1986, and the general concessionary nature of the Eastern's contract proposals (including a 20% pay reduction for pilots) it is inconceivable that Eastern would propose, or ALPA believed that Eastern was proposing the high-cost Allegheny-Mohawk LPP's." Id. at 31. This Company argument has at least some merit – it cannot be totally discounted or rejected by the Board.

[21] Co. Brief, p. 3.

[22] Co. Brief, pp. 25-26, Transcript citations omitted.

> assumption was clearly reasonable, because seated across the table was Mr. Bradley, who in conjunction with Mr. Rosen had first informed Mr. Gibson about TWA LPP's, suggesting that these limited LPP's could be the basis for an agreement between Eastern and ALPA on LPP's. Mr. Gibson knew that Messrs. Rosen and Bradley had advised him that TWA LPP's, Sections 3 and 13 of Allegheny-Mohawk LPP's, were the heart of the TWA agreement and that proposing these sections might serve to break the deadlock between the parties on LPP's."

ALPA's Director of Representation, Seth Rosen, testified on cross-examination before the Board (Tr 1023):

> "Q. You did tell him [Gibson], did you not, that Sections 3 and 13 of the Allegheny-Mohawk LPP's was the heart of the LPP's?
>
> "A. When I gave him the copy of the LPP's I told him he should look at 3 and 13 because they cover seniority integration.
>
> "Q. I think you used the words 3 and 13 are the heart?
>
> "A. From my perspective, because they control seniority. From my perspective they are the heart."

In turn, ALPA explains in its Brief (p. 11) that:

> "Mr. Rosen was not authorized by the Negotiating Committee to negotiate for the Eastern pilots but was authorized to go (with John Bradley) see representatives of Eastern * * * . The purpose of that meeting was 'to ascertain exactly what the status of negotiations were, to try to get a picture of where we were. That was basically listening to the Company on their so-

> called open issues.' Tr. 1006 (Rosen). Precisely what happened at Mr. Ussery's office is disputed: Mr. Gibson alleges that Mr. Rosen indicated that while they would like full Allegheny-Mohawk LPP's, ALPA would be willing to settle for TWA LPP's and pointed to only sections 3 and 13 of Allegheny-Mohawk LPP's, Tr. 825, 946-48, 959 (Gibson); Mr. Rosen strenuously denies this and testified that he gave Mr. Gibson the complete Allegheny-Mohawk LPP document at this point, stressed ALPA's interest in triggers, and told him to look at the TWA Agreement (without isolating the LPP's). Tr. 1006-09, 1025 (Rosen)."

Thus, it is undisputed at least that although Rosen was not authorized to negotiate for the Eastern pilots (Gibson has in fact acknowledged that Rosen did not negotiate), Rosen *was authorized* to talk with Company Officials and he did direct them to the TWA Agreement. Director of Representation Rosen testified that the purpose of this meeting was "to see if there was any way to get the negotiating process started because it * * * had been stymied" (Tr 1020), and that he "made general reference to the fact [that ALPA] had reached an agreement at TWA, including a wrap around agreement, with Carl Icahn, and they contained some language that should be looked at" (Tr 999). ALPA has not denied the validity of this testimony. Certainly, by implied ratification, if not otherwise (as by prior express authorization), Rosen was the authorized agent of the Pilot Negotiating Committee.[23]

---

[23] Also relevant in this regard is the fact that Rosen promptly met with the ALPA Negotiating Committee to brief them as to "generally what we had discussed." Tr 1010.

Even assuming *arguendo* that the ALPA Negotiating Committee was not fully informed regarding all that had transpired in the discussions between Rosen, Bradley, Gibson, and Ussery, knowledge of the above-noted words and actions of Director of Representation Rosen in those discussions (and also the resultant knowledge that thereafter the Company in using the acronym "LPP's," might be thinking in terms of TWA LPP's, or at least might not be thinking exclusively in terms of Allegheny-Mohawk LPP's), *must be imputed to* the ALPA Negotiating Committee:

> " 'It is the general rule, settled by an unbroken current of authority, that notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal.'
>
> * * *
>
> "The fact that the knowledge of or notice to the agent was not actually communicated to his employer will not prevent the operation of the general rule that the master-principal is chargeable with such knowledge or notice."[24]

Moreover, another possible basis for charging the pilot representatives with notice that Eastern Proposal No. 7 might not be intended to give the pilots full Allegheny-Mohawk LPP's, would be application of the "constructive notice" concept: "*Constructive notice* exists when the party, by any circumstance whatever, is put upon

---

[24] Ferson, Principles of Agency, §100 (1954), quoting Mechem, Agency, 2d ed. §1803.

inquiry * * * ."[25] The Company has pointed to various circumstances calling for inquiry and which likely would have led to inquiry had the pilots' desire to obtain an agreement on February 23, 1986, not been so urgent.[26]

As noted above in the quotation from ALPA's Brief, the testimony of Gibson and that of Rosen differs dramatically as to whether Rosen stated that ALPA would like Allegheny-Mohawk but could live with the TWA LPP's, and stated that the TWA LPP's were Allegheny-Mohawk Sections 3 and 13.[27] Without attempting to reach any conclusion as to which version is accurate, it is clear enough that regardless of what Rosen's words actually were in the course of his discussions with Gibson and Ussery, and regardless of what might have been Rosen's actual intent, the message that Gibson actually received from the discussions was that something less than the full package of Allegheny-Mohawk LPP's would at least be considered by ALPA – and that, in particular, Sections 3 and 13 of the Allegheny-Mohawk LPP's possibly could be the LPP protection to be adopted.

Upon weighing all of the evidence relating to ALPA's claim to full Allegheny-Mohawk LPP's, it cannot reasonably be concluded that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's.

---

[25] Bouvier's Law Dictionary, 3rd ed. §1803.

[26] Company Brief, pp. 12-13. Also regarding cause for inquiry, see Tr 316-317, 324, 326-327.

[27] For some of their conflicting testimony on this see Tr 948, 959 (Gibson); Tr 1009 (Rosen).

But can the Company's basic position in this case be considered to be the most reasonable construction of the February 23 Agreement's reference to LPP's? As previously noted, the Company's basic position is that the February 23 Agreement's reference to LPP's incorporates "Sections 3 and 13 of the Allegheny-Mohawk LPP's," but "which would become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier."

On the morning of February 23, 1986, the Company's then Chairman of the Board of Directors and CEO, Colonel Frank Borman, requested that he meet alone with the ALPA negotiating Committee. ALPA negotiators have testified literally or in substance that in that meeting Colonel Borman made a commitment that LPP's were "not a problem" and that the pilots were entitled to them.[28] The Company states in this regard:

> "Colonel Borman met with the pilots to add urgency to the need for an agreement. He did not meet with the pilots to negotiate, and he struck no private deals with the pilots. Although ALPA attempts to make much of their private meeting with Colonel Borman, ALPA's negotiators did not 'use the term Allegheny-Mohawk, [or] Standard LPP's' at any time during that meeting. Even if this Board is to credit ALPA's witnesses' assertions that Colonel Borman said that LPP's 'were not a problem', that does not establish that Colonel Borman meant Allegheny-Mohawk LPP's. This is particularly true because

---

[28] ALPA Brief, pp. 13-14; Tr 76, 247, 332-333 (Tully testimony); Tr 657, 660-661 (Loomos testimony).

> [ALPA negotiator] Christy advised Colonel Borman that the pilots ' . . . [were] concerned about seniority . . . ' "[29]

ALPA's evidence in this case is not sufficient to establish that Colonel Borman made a commitment to the pilots to grant the full package of Allegheny-Mohawk LPP's; and this is particularly so in view of the fact that neither the term "Allegheny-Mohawk" nor even the word "standard" was contained in any of ALPA's written proposals from the commencement of negotiations in early December 1985 until negotiations culminated with the signing of the February 23 Agreement.[30] Also, as far as

---

[29] Company Brief, p. 22, citations of Transcript and Exhibits omitted. It may be noted that ALPA Negotiating Committee Chairman Tully testified as follows on cross-examination (Tr 246-247):

> "Q. If I remember your testimony on direct it was that you said that you wanted LPP's and Colonel Borman said he didn't have a problem with that. Is that a fair characterization of your testimony?
>
> "A. That is correct * * *
>
> "Q. You never said well, we want Allegheny-Mohawk LPP's did you?
>
> "A. We didn't use the term Allegheny-Mohawk, Standard LPP's."

But regarding ALPA Negotiating Committee meetings with the Eastern Negotiating Committee (Borman not present), Tully testified that the ALPA Negotiating Committee did speak of "Standard Labor Protective Provisions," and that "perhaps" some ALPA negotiator "may have used Allegheny-Mohawk." Tr illegible But Tully also testified that it "may not have been used." Tr 184.

[30] The negotiations which resulted in the February 23 Agreement commenced in early December and the Company

notice to Borman from ALPA otherwise is concerned, it appears to be more likely that only the general term "LPP's" was brought to his attention (see Footnote 29, above). And since Gibson and Ussery understandably may have been thinking in terms of LPP's significantly less beneficial to the pilots than the full package of Allegheny-Mohawk LPP's, notice cannot reasonably be imputed to Borman through Gibson and Ussery that the

---

tendered the first proposal, after which ALPA made its first proposal. Tr 52 (Tully). "LPP's were first proposed by ALPA's Negotiating Committee on January 17, 1986 with delivery of ALPA Proposal No. 4 * * * [which] concluded as follows: * * * ALPA is proposing that the amended agreement provide for LPP's." ALPA Brief, pp. 8-9. Reference to LPP's in later ALPA proposals similarly used merely the general term "LPP's." In the latter regard, the Company observes that "The October 6, 1985 letter from Mr. Schulte to Colonel Borman demonstrates that ALPA is capable of clearly proposing Allegheny-Mohawk LPP's," Schulte having explained in the letter that "The Labor Protective Provisions that were imposed in the Allegheny-Mohawk merger are the ones that I propose should be used to protect our pilots * * *." Company Brief, p. 21 fn 15. That letter from Schulte (MEC Chairman and grievant in the present case) is in evidence as ALPA Ex. #6. On the Company's part, the only reference at all to LPP's in any of the Company's written proposals made at any time in the course of the negotiations which commenced in December 1985 and culminated with the signing of the February 23 Agreement, was that contained in Company Proposal No. 7, which is now before the Board for construction. See Tr 87. Even in oral discussions between the Eastern and ALPA Negotiating Committees, while the word "standard" sometimes was used by ALPA, the term "Allegheny-Mohawk" may not have been used at all. See Footnote 29, above; ALPA Brief, p. 6; Company Brief, p. 21.

pilots were thinking only in terms of the full package of Allegheny-Mohawk LPP's.[31]

But notwithstanding the foregoing considerations. and notwithstanding Colonel Borman's assertion by deposition that he did not meet with the ALPA Negotiating Committee to negotiate,[32] the strong testimony by ALPA witnesses (who testified in person before the Board and were subjected to cross-examination) sufficiently

---

[31] Regarding *actual* notice to or knowledge by Borman during the negotiations which culminated in the February 23 Agreement, the record in this case does not reveal what might have been his actual understanding or thoughts concerning LPP's. As previously stated, the term "LPP's" standing alone is too general to be clear and certain as to scope. The ALPA Negotiating Committee only asserts its use of that general term when Borman met alone with the Committee. See Footnote 29, above. And on the Company's side, Gibson testified that he did not talk to Borman about LPP's. Tr. 908. Thus, Borman's actual understanding or intent concerning LPP's, whatever it was, should not be a factor in the decision in this case. However, as stated below, an important factor is that one of the messages which the ALPA Negotiating Committee actually received from Borman was that the pilots could expect meaningful contractual protection from LPP's.

[32] Borman's deposition, given in connection with court proceedings, contains no apparent reference to LPP's, but he did deny that he negotiated with the ALPA Negotiating Committee when they met alone. Company Ex. #18, pp. 46, 50-51. The Company states that after the meeting Borman disclaimed also having made any deal with the Committee. Company Brief, pp. 22-23, citing testimony by Gibson. Because Borman did not appear before the Board to give testimony, it was not possible to question him on what he might have said on the subject of LPP's.

establishes that regardless of what Borman's words actually were during his February 23, 1986, meeting with the ALPA Negotiating Committee, and regardless of what might have been his actual intent at that time, one of the messages which the Committee actually received from him as Company CEO was that the pilots could expect LPP's which would provide meaningful protection as a matter of contractual right.

Is the Company now acknowledging meaningful protection? Could the pilots reasonably be expected to get any real sense of security or peace of mind from the Company's basic position in this case? Certainly the pilots reasonably could question whether they would have meaningful LPP protection as a matter of contractual right if the Board were to accept the Company's position that although Sections 3 and 13 have been incorporated into the February 23 Agreement, they shall "become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier."

ALPA declares that meaningful LPP protection "becomes illusory" under the Company's construction of the reference to LPP's in the February 23 Agreement,[33] and ALPA explains its view of "meaningful" LPP protection:[34]

> "Meaningful protection under standard LPP's was and is of grave concern to the Eastern pilots. In addition to certain pecuniary

---

[33] ALPA Brief, p. 1.

[34] ALPA Brief, p. 26.

> allowances under standard Allegheny-Mohawk LPP's [a footnote here refers to 'displacement allowances, dismissal allowances, real estate claims, etc.'], genuine job security derives in large part from preserving the separate integrity of assets and operations of the merging carriers until a fair and reasonable seniority integration of labor groups is accomplished. Thus, standard LPP's provide triggers for the immediate integration of labor groups once the separate integrity of assets and operations is disturbed. [Here ALPA cites Allegheny-Mohawk Section 2(a) as broadly defining 'merger' to mean joint action by the two carriers whereby they 'unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services', Section 3 as triggering seniority integration immediately insofar as the merger affects seniority rights, and Section 13 as providing for expedited arbitration of seniority integration.] Such Allegheny-Mohawk seniority integration triggers, coupled with liabilities from pecuniary allowances, are the heart of meaningful protection * * * ."

As the just-quoted ALPA statement indicates or at least implies, Allegheny-Mohawk Section 3 has its own "trigger." And ALPA also is correct in asserting that meaningful LPP protection "becomes illusory" under the Company's position in the present case. In substance if not in words, the Company position is that:

> The February 23 Agreement does not incorporate the full package of Allegheny-Mohawk LPP's; but it does incorporate Allegheny-Mohawk Sections 3 and 13 except as they are modified by the following facts or alleged facts:

(a) The TWA Agreement substitutes a different "trigger" for Allegheny-Mohawk Section 3;

(b) The "trigger" under the TWA Agreement is that there must have been a decision by management that seniority lists shall be integrated; and

(c) In adopting the February 23 Agreement the Parties adopted the TWA Agreement trigger making a management decision to integrate seniority lists a condition precedent to the applicability of anything contained in Allegheny-Mohawk Section 3.

It will be recalled that the following statement was made earlier in this Opinion: "Upon weighing all of the evidence relating to ALPA's claim to full Allegheny-Mohawk LPP's, it cannot reasonably be concluded that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's." Now it must be stated, more specifically, that the evidence in the present case does not sustain ALPA's contention that the pecuniary allowances provided in the Allegheny-Mohawk LPP's may be asserted, in addition to the protection of Sections 3 and 13, as a matter of contractual right by Eastern's pilots. But even without the pecuniary allowances, as desirable as they may be, the protection of seniority itself by application of Sections 3 and 13 is of such critical importance that this without more does constitute meaningful protection under the February 23 Agreement. The latter belief or conclusion would hold as well even without the support of ALPA Director of Representation Rosen's testimony

that Sections 3 and 13 are the "heart" of the Allegheny-Mohawk LPP's "because they control seniority." But Rosen's words do state it very well.

Before further comment is made regarding Sections 3 and 13 of the Allegheny-Mohawk LPP's, those important Sections are quoted now in full:

> "Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
>
> "Section 13(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations

representing the employee or employees, or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

"(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties."

Under the Company's position, Sections 3 and 13 would not in reality be the controlling factor as concerns seniority. Rather, Company discretion or freedom of choice would be the controlling factor. In any event, if the Company's position regarding applicability of the TWA trigger were accepted by the Board in the present case, then as long as any reasonable possibility might continue to exist that the TWA trigger ultimately would be construed to require a management decision to integrate seniority lists as a condition precedent to the protection of Sections 3 and 13, doubt would remain as to whether the pilots would in fact have any meaningful protection.[35]

---

[35] A contention that management would have discretion, under the TWA Agreement, to decide whether or not there will be any integration of seniority lists would in no sense be frivolous. In the latter regard, note that Paragraph 10 of the TWA Agreement provides (ALPA Ex. #4, pp. 7-9) that "if TWA,

In light of various considerations discussed hereinabove, the board should nor issue any award in this case which is not definitely intended and calculated to recognize meaningful LPP protection for pilots as a matter of contractual right under-the February 23 Agreement. Nor need the Board do so, for Allegheny-Mohawk Section 3 has its own "trigger." That trigger inheres in the Section 3 words "Insofar as the merger affects the seniority rights of the carriers' employees." The meaning

---

New TWA or the Icahn Group acquires" control of another airline, then by (b)(iii):

> "Section 3 and Section 13 (as it relates to Section 3 alone and to the extent it may be invoked by the airline or the pilots' collective bargaining representatives alone) of the AAA-MOH LPPs, dealing with integration of seniority lists, shall be provided to the TWA Airline pilots in the event of any full or partial merger of the pilot seniority lists of the TWA Airline and the Acquired Airline."

One entirely rational interpretation of the just-quoted provision would be that only the carrier (or possibly the carrier in conjunction with the pilot bargaining representative but in no case the latter alone) may decide *whether* under Section 3 there is to be any integration of seniority lists, but *if* it is decided that seniority lists shall be integrated, then either the carrier or the pilot bargaining representative may require use of arbitration under Section 13 to determine *how* or by what integration scheme the lists shall actually be combined. Under this interpretation of the TWA Agreement the carrier obviously could prevent integration of seniority lists and accordingly the condition precedent for the application of Sections 3 and 13 would be absent. Thus, acceptance of the Company's full position in the present case could indeed make meaningful LPP protection "illusory," as ALPA has stated.

of the term "merger" in the just-quoted phrase is specified by the Allegheny-Mohawk Section 2(a) definition ot [sic] the term:

> "Section 2(a). The term 'merger' as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities."

Significantly, the foregoing Section 2(a) definition of the term "merger" is expressly made applicable wherever the term is "used herein." It is certain that the just-quoted word "herein" refers to the Civil Aeronautics Board document containing LPP's promulgated by the Board for the Allegheny-Mowawk merger ("and applied by the Board in later cases with virtually no changes"[36]). Thus, the Section 2(a) definition is inherently and necessarily a part of each and every Allegheny-Mohawk provision in which the term "merger" is used, and this of course applies to use of the term "merger' in Section 3. Moreover, being an inherent and necessary part of Allegheny-Mohawk Section 3, the Section 2(a) definition must be deemed applicable to Section 3 whenever other parties adopt Section 3 for their own use unless they make it abundantly clear that their intent is otherwise. Eastern and ALPA did adopt Allegheny-Mohawk Section 3 for use in the February 23 Agreement. But by no means did Eastern make it

---

[36] The latter quotation is from the "Remanded Texas Air-Eastern Acquisition Case" decision of the Department of Transportation, as previously quoted hereinabove.

abundantly clear, either when Eastern drafted its Proposal No. 7 or when Gibson read the proposal to the ALPA Negotiating Committee, that the term "merger" as used in Section 3 would mean anything different from the meaning given it by the Civil Aeronautics Board in the Allegheny-Mohawk LPP's. And it is even more certain that the ALPA Negotiating Committee was given no hint, when Eastern Proposal No. 7 was read to them, that it was intended to leave pilot LPP protection up to the future choice and discretion of the Company.[37]

Had the ALPA Negotiating Committee received at least a hint of any such Company intent, the Committee might well have then taken to the MEC a much different position on Eastern Proposal No. 7 than the apparently neutral position which was actually carried to the MEC. There is no thought here of charging the Company with intent to deceive. But it is entirely fitting to point out that if the Company intended by its Proposal No. 7, the highly uncertain protection produced by the Company's present position regarding the triggering of Sections 3 and 13,

---

[37] See Tr 88-89 where ALPA Negotiating Committee Chairman Tully described the atmosphere prevailing when Eastern Negotiating Committee Chairman Gibson read Eastern Proposal No. 7 to the ALPA Committee, and where Tully also testified as follows: "He [Gibson] gave us the proposal * * * . He ran through it very briefly, and said, I am paraphrasing once again, he said, we have to leave. We have to go now." Apparently Gibson said little if anything about the Company's LPP proposal. See Tr 108-109 (Tully); 855-857, 930 (Gibson). Surely, caveat emptor is not acceptable as the order of the day notwithstanding the fact that pressure on the ALPA Negotiating Committee was coming not only from the Company but also from the pilot group.

then the Company was obligated to inform the pilots of that intent. And this is so even though no question was asked about the reference to LPP's when Proposal No. 7 was read to the ALPA Negotiating Committee on February 23, 1986.[38]

Under all of the evidence of record in this case and in light of all of the considerations discussed above in this Opinion, it is concluded that the most reasonable construction of the reference to LPP's in the February 23 Agreement is that it incorporates into the latter Agreement Sections 2(a), 3, and 13 of the Allegheny-Mohawk LPP's.

---

[38] At various points in the course of reading the proposal to the ALPA Negotiating Committee Gibson offered opportunity for questions, but apparently none was asked. See Tr 266-268 (Tully on cross-examination). But as stated above, an obligation to volunteer information existed as concerns LPP's. On the other hand, the recognition of an obligation to volunteer information does not apply equally to the Company's intent not to provide pecuniary allowances such as those provided by the Allegheny-Mohawk LPP's, since no ALPA spokesperson had stressed that type of protection to the Company nearly as emphatically as the Section 3 and Section 13 protection was stressed. And here we should note again the Company's argument that "Considering Eastern's dire financial condition on February 23, 1986, and the general concessionary nature of Eastern's contract proposals (including a 20% pay reduction for pilots) it is inconceivable that Eastern would propose, or ALPA believed that Eastern was proposing the high-cost [pecuniary allowances provided by the] Allegheny-Mohawk LPP's." Company Brief, p. 31. As stated earlier in this Opinion, this Company argument has at least some merit – it should not be totally discounted or rejected.

AWARD

The L. D. Schulte grievance (ALPA Case No. 1-86) is hereby resolved as follows: As concerns labor protective provisions, the February 23, 1986, Agreement between ALPA and Eastern Air Lines includes Sections 2(a), 3, and 13 of the Allegheny-Mohawk LPP's. It does not include any other provision which is included in the TWA Agreement; nor does it include any other part of the Allegheny-Mohawk LPP's except that the question whether it includes Allegheny-Mohawk Section 2(d) need not be answered and is not answered in the present case.

By order of the Eastern Air Lines Pilots System Board of Adjustment September 22, 1989

/s/ Frank Elkouri
Frank Elkouri, Neutral Referee

/s/ J. P. Distel
J. P. Distel, Association Member

/s/ George T. Jehn
George T. Jehn, Association Member

SEE ATTACHED OPINION
William R. Tegtman, Company Member

SEE ATTACHED OPINION
Noel R. Honohan, Company Member

Dissenting: /s/ William R. Tegtman

/s/ Noel R. Honohan

APPENDIX E

Allegheny-Mohawk Labor Protective Provisions

DOCKETS 23682, 23371
(72-4-43, 72-4-31, 72-4-32)
ALLEGHENY-MOHAWK MERGER CASE

APPENDIX B

Labor protective visions

Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by the proposed merger of Allegheny Airlines, Inc., and Mohawk Airlines, Inc., approved by the attached order, and it is the intent that such conditions are to be restricted to those changes in employment due to and resulting from such merger. Fluctuations, rises and falls, and changes in volume or character of employment brought about by other causes are not covered by or intended to be covered by these provisions.

Section 2. (a) The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein refers to either Allegheny or Mohawk or to the corporation surviving after consummation of the proposed merger of the two companies.

(c) The term "effective date of merger" as used herein shall mean the effective date of the amended certificates of public convenience and necessity transferred

to Allegheny pursuant to the approval granted in the attached order.

(d) The term "employee" as used herein shall mean an employee of the carriers other than a temporary or part-time employee.

Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

Section 4. (a) Subject to the applicable conditions set forth herein, no employee of either of the carriers involved in the merger who is continued in service shall as a result of the merger be placed in a worse position with respect to compensation than he occupied immediately prior to his displacement so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules, and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him immediately prior to such date, except, however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last 12 months in which he performed service immediately preceding the date of his displacement (such 12 months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee; and if his compensation in his current position is less in any month in which he performs work that the aforesaid average compensation, he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

(d) The protection afforded herein shall apply only to displacements occurring within a period of 3 years from the effective date of the merger (referred to herein as the claim period); and the period during which this

protection is to be given (referred to herein as the protective period) shall extend for a period of 4 years from the date on which the employee is displaced.

Section 5. (a) Any employee of either of the carriers participating in the merger who is deprived of employment as a result of said merger shall be accorded an allowance (hereinafter termed a "dismissal allowance"), based on length of service, which (except in the case of an employee with less than 1 year of service) shall be a monthly allowance equivalent in each instance to 60 percent of the average monthly compensation of the employee in question during the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the merger. This dismissal allowance will be made to each eligible employee, while unemployed, by Allegheny during a period beginning at the date he is first deprived of employment as a result of the merger and extending in each instance for a length of time determined and limited by the following schedule:

Length of service (years)	*Period of payment (months)*
1 and less than 2	6
2 and less than 3	12
3 and less than 5	18
5 and less than 10	36
10 and less than 15	48
15 and over	60

In the case of an employee with less than 1 year of service, such employee shall not be covered by the benefits provided in this section, but shall receive such benefits, and only such benefits, as are provided by section 7.

(b) For the purpose of these provisions, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier, and he shall be given credit for 1 month's service for each month in which he performed any service (in any capacity whatsoever) and 12 such months shall be credited as 1 year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization, he will be given credit for performing service while so engaged on leave of absence from the service of the carrier: *Provided,* That in calculating the dismissal allowance for such an employee, such allowance shall be based upon the compensation paid such employee by the carrier during his last 12 months of service on the company payroll and not on the compensation he may have been paid by the employee representative organization.

(c) An employee shall not be regarded as deprived of employment in case of his resignation, death, or retirement on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furlough because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the

result of the merger who is not deprived of his employment within 3 years from the effective date of said merger.

(d) Each employee receiving a dismissal allowance shall keep Allegheny informed of his address and the name and address of any other person by whom he may be regularly employed.

(e) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a dismissal allowance accordingly if any is due.

(f) An employee receiving a dismissal allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(g) If an employee who is receiving a dismissal allowance returns to service the dismissal allowance shall cease while he is so reemployed, and the period of time

during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, however, he shall be entitled to protection in accordance with the provisions of section 4.

(h) If an employee who is receiving a dismissal allowance obtains other employment, his dismissal allowance shall be reduced to the extent that the sum total of his earnings in such employment plus his allowance and any unemployment insurance benefit (or similar benefit) exceed the amount upon which his dismissal allowance is based: *Provided,* That this shall not apply to employees with less than 1 year's service.

(i) A dismissal allowance shall cease prior to the expiration of its prescribed period in the event of –

1. Failure without good cause to return to service after being notified of a position for which he is eligible and as provided in paragraphs (f) and (g);

2. Resignation;

3. Death;

4. Retirement or on account of age or disability in accordance with the current rules and practices applicable to employees generally;

5. Dismissal for justifiable cause.

Section 6. An employee affected by the merger shall not during the applicable protective period be deprived of benefits attaching to his previous employment, such as hospitalization, relief, and the like.

Section 7. Any employee eligible to receive a dismissal allowance under section 5 hereof may, at his option at the time of merger, resign and (in lieu of all other benefits and protections provided in these provisions) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of service (years)	*Separation allowance (months pay)*
1 and less than 2	3
2 and less than 3	6
3 and less than 5	9
5 and over	12

In the case of employees with less than 1 year's service, 5 days' pay, at the straight time rate per working day of the position last occupied, for each full month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in section 5.

(b) One month's pay shall be computed by multiplying by 30 the calendar daily rate of pay received by the employee in the position last occupied prior to the time of the merger.

Section 8. (a) Any employee who is retained in the service of the carrier surviving the merger (or who is later restored to service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger and is therefore required to move his place of residence shall be reimbursed for all expenses of moving

his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer and for a reasonable time thereafter (not to exceed 2 working days) used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier and the affected employee or his representative. No claims for expenses under this section shall be allowed unless they are incurred within 3 years from the effective date of the merger, and the claim must be submitted within 90 days after the expenses are incurred.

(b) Changes in place of residence subsequent to the initial change caused by the merger which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 9. (a) The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of the carriers involved in this merger (or who is later restored to such service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger and is therefore required to move his place of residence.

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered

in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the merger to be unaffected thereby: *Provided, however,* That if the home is not sold within a substantial period of time after the merger, then the fair value of the home shall be determined as of a date as closely related to the date of sale as possible, with an agreed-upon adjustment being made to exclude any effect of the merger on such fair value. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relive him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the merger which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within 3 years after the effective date of the merger.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or his representative and the carrier, and in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the carrier, respectively; these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser or to select some person authorized to name the third appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required, and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 10. If either carrier, on or after May 5, 1971, shall rearrange or adjust its forces in anticipation of the merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under these provisions as an employee immediately affected by the merger, these provisions shall apply to such an employee as of the date when he is so affected.

Section 11. Allegheny and Mohawk shall jointly or severally give at least 45 days' written notice containing a full and adequate statement of the proposed changes to be effected by the merger, including an estimate of the number of employees of each class, craft, or field of endeavor affected by the intended changes. Such notice shall be posted on bulletin boards or other conspicuous places convenient to the employees of said carriers, and a copy of the notice shall be sent by registered mail to all authorized representatives of any of the employees of both carriers.

If requested in writing by any employee or employees of either carrier or the authorized representative of such employee or employees, the date and place of a meeting between said employees or their representatives and the representatives of the carriers to settle problems of the rearrangement of such employees arising out of and because of the merger shall be agreed upon within 10 days after such request is received by the carrier. The meeting shall commence within 30 days from the date the request is received by the carrier.

In the event of a failure to agree upon a settlement of a problem or of problems presented at the meeting, the unsettled problems may be submitted by either party for adjustment in accordance with section 13.

Section 12. No employee of either carrier shall, as a condition of eligibility for the protection afforded by the terms of this order be required to accept employment with the surviving carrier that is not within the class, craft, or field of endeavor in which he was employed by either carrier on the date of the attached order.

Section 13. (a) In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equaliy by the carrier and (i) the organization or organizations representing the employee or employees or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure unless and until that alternative method or procedure shall have been agreed to by all the parties.

APPENDIX F

List of Individual LPP Claimants

ABER, LELAND A
ACHILLE, JOSEPH M
ADAMS, JAMES B
ADAMS, KEITH J
ALEXANDER, HAROLD G
ALEXANDER, PETER M
ALFORD, WAYNE L
ALLEN, CHARLES D
ALLEN, ROBERT J
ALSUP, CLAUDE F
ALVAREZ JR, JOSE A
ANDERSON, DWIGHT D
ANDERSON, RONALD R
ANDREWS JR, GEORGE M
ANGELETTI, THOMAS J
ARGUEZ, RICHARD A
ARMSTRONG III, FRANCIS C
ARNOTT, BRIAN G
ATTEBERRY, WILLIAM M

BALDONI, LUIS A
BALDRIDGE JR, JAMES H
BAQUE III, FRANK
BARGE, PATRICK S
BARNES, WILLIAM H
BARNES, H BRYANT
BARRERO, FRANCISCO E
BARTLETT, DAVID R
BASS, WAYLON T
BAUCH, JAMES H
BEARD, RONALD E
BEATTIE, DONALD G
BEATY, GREGORY L
BEELS, ROBERT L
BEER, LESLIE B
BEHR, CAPT. PETER J
BELL, DAVID A
BELL, LARRY A

BERGHANE, DEAN A
BERGSTEIN, DAVID S
BERGSTROM, STEVE Y
BERWICK, TIMOTHY N
BIALKO, PETER J
BICHAN, BRUCE G
BIEBERSTEIN, JOHN R
BIGGS, CLIFFORD G
BISGNANO, CHARLES R
BJELKEVIG, RICHY A
BLANKENSHIP JR, OTIS T
BLIX III, VICTOR E
BONNA, FRANK
BORSUM, LESLIE J
BOWLER, ROLAND K
BRAMHAN, PIERS R
BRANAM, EDDIE L
BREDTHAUER, DIRK
BRIDGES, JAMES D
BRILEY, PAXTON H
BRITZIUS, EDWARD K
BROWN, RONALD B
BROWN JR. WALTER R
BROWNING, DAVID L
BRUNDAGE JR., GRANT H
BRYANT, CHARLES C
BUCHANAN, EDWARD J
BUNDRANT, WILLIAM D
BUNTIN JR., EDWARD S
BURKE, THOMAS W
BURKHART, RONNIE L
BURNS, DAVID A
BUTTS, RONALD G

CALDWELL, QUINTON M
CAPON, RICHARD E
CARLSON, BRUCE E
CHAILLE, BRUCE F

CHAMPAGNE, CARL M
CHAPO, JIM E
CHARNES, JONATHAN E
CHIRINO, RAFAEL E
CHRISTOPHER, ANTHONY S
CIRROTTI, DENNIS J
CLARK, DOUG E
CLARK, FRANCIS X
CLARY, BONNIE K
CLARY, MICHAEL I
COBLE, DONALD R
COCUZZO, DAVID J
COE, GEOFFREY B
COLE, JOHN D
COLE, WILLIAM F
COLLI, GUIDO F
COLLIER, WILLIAM R
COMMANDER JR., JOHN B
COMPTON, JOHN P
CONNELL III, EARLE W
COOK, KENNETH E
COOK, CARL D
COTTER, STEPHEN B
COWEN, JOHN R
COXHEAD, PETER C
CRANE, WENDELL E
CRAUS, CLIFF M
CROW, KENNETH P
CRUSH, JAMES M
CURRAN, THOMAS R

DAVIDSON, WILLIAM F
DAVIS, JOHN E
DAVIS, GERALD D
DAVIS, WILLIAM R
DAVISON, DAVID J
DECKER III, CHRISTIAN F
DEEG JR, RAYMOND J

DEMING, MAURY A
DEPHILLIPS, FLOYD M
DIBICCARI, DONALD
DICKINSON, RANDALL L
DICKMAN, GEORGE A
DOBSON, GORDON W
DOGLIONE, FRANK H
DONOVAN, MICHAEL F
DORAN, BENNY R
DOUGHERTY JR, RALPH A
DUCKWORTH, THOMAS O
DUKIET JR, WALTER W
DUNDAS, CHARLES P
DUNN, RICK A
DUNN, LARRY J
DURANTE, JOHN P
DYLONG, JOSEPH

EASTMAN, JERRY D
EDWARDS, KENNETH A
EGUT, RONALD S
ELDRIDGE, THOMAS W
ELLIS JR, JAMES R
ELMDANAT, ROBERT
EMERY JR, JAMES C
ENGELKE, WARREN L
ENGLISH, GARY M
ERDMAN, THOMAS G
ERICKSON, ALAN W

FAGAN, THOMAS E
FAHN, CHARLES L
FALLAVOLLITA, SERAFINO
FANT JR, GLENN E
FARENGA, JACK H
FARNSWORTH, EARNEST L
FARRELL, RICHARD L
FAULKNER JR, HENRY C

FELIU, JOHN E
FENNELL, GLENN W
FERTE, GERALD
FICKLEN III, JOHN D
FILLER, ROBERT E
FISHER III, JOEL F
FLEISCHMAN, JOHN C
FLETCHER, RONALD A
FONG, GERALD W
FORMAN, ERROL D
FORREST, DOUGLAS W
FORSBERG, SCOTT
FOSTER, KERRY A
FOSTER, ROBERT W
FOSTER JR, DEWEY D
FOWELLS, JAMES E
FRANCIS, RICHARD H
FRATER, KEVIN X
FRAZIER, BENNIE W
FREDERICK, PAUL E
FRITCH, DONALD A
FROST, WAYNE B
FRYLING, ALBERT A
FUGEDY, JOHN J
FULLER, ESTAN L

GAEDTE, MICHAEL L
GAMEL, LARRY L
GARRARD, SAMUEL L
GARY, CARROL J
GARZA, ERNESTO
GAZDA, RICHARD S
GEORGE, HENRY R
GERAGHTY, JAMES D
GIBSON, RANDALL W
GILES JR, JAMES T
GLASGOW, JAMES S
GLENNON, MARTIN F

GORMAN, BARRY W
GREEN, GRANT S
GREEN, GERALD A
GREENE, DAVID L
GREKSA, GARY J
GRENIE, ARLES A
GRESHAM, JACK S
GRIBAS, KENNETH C
GRIFFIN, DONNY E
GROFF, WILLIAM V
GRUETZNER, ALLEN R
GRZEGORZAK, STANISLAW K
GUNN, GEORGE H
GURL, JOHN T
GWYNN, GARY L

HABY, CLIFFORD M
HAIGHT, RICHARD A
HALL, HOWARD W
HALL, LARRY M
HALL, VANCE W
HAMILTON, WALCOTT D
HANLEY, DARYL R
HANSHAW, RONALD G
HARN, GEORGE F
HARRISS, ROBERT J
HARTMAN, JAMES T
HARTMAN, EUGENE D
HASSETT L-1011, PATRICK R
HASTINGS, GREGORY A
HAWKINS, THOMAS R
HECKENBERGER, RICHARD H
HEINRICH, ALAN P
HESSLER JR, ROBERT R
HIATT JR, HARVEY W
HIGGINS, RAYMOND F
HILL, WARREN B
HINSDALE, JAMES P

HODGERS, BEN
HOOTON, JAMES W
HOWARD, JAMES W
HOWARD, CHARLES B
HUDDELSTON, JAMES D
HUDSON, CHARLES V
HUGHES JR, JAMES R
HUGHES, JOHN W
HURON, ROBERT C
HUTCHINS, ROBERT A

INGRAM II, CULPEPPER F
INMAN, BROWNIE N
IRANIPOUR, FARZIN
IVEY, DAVID J

JACKSON JR, FRED H
JACOBOWITZ, LEONARD
JARRETT, MARK D
JOHNSON, GARY M
JOHNSON JR, DARWIN E
JOHNSON, ROBERT E
JOHNSON, RICHARD A
JOHNSON, GRANT S
JOHNSON, RICHARD A
JONES, JOHN L
JORDAN, WILLIAM O

KALANTARI, FEREADOON
KAMRAD, KURT M
KANE, STEVEN G
KAY, THEODORE L
KEATING JR, WALTER J
KEELER JR, RALPH L
KELLER, CLARK R
KELLEY, WILLIAM J
KENT, JESSE H
KHAN, NAZIR
KINGWELL, RICHARD A

KLUTHE, DAVID B
KOBLAS, JAMES J
KOZIOL, ROBERT L
KRANTZ JR, ARON F
KRITCHER, LAWRENCE N
KROTZ, GARY E
KUNTZ, ALBERT W
KURZ, EDWARD S

LAINE, JAMES R
LAING, RICHARD L
LAMAUTE, LYONEL L
LAMBIE, JOHN M
LAMECKER, DENNIS R
LAMPKE, ROBERT H
LANDA, GEORGE
LANDRY JR, DONALD J
LANE JR, GORDON B
LANE, DAVID G
LANE, FRANKLIN W
LANE, DAVID N
LANGEL, WILLIAM A
LANGER, LAWRENCE E
LAPP JR, CHAUNCEY M
LATHAM, RICHARD C
LAURIA, LOUIS J
LAWRENCE, CHARLES W
LAZAR, DENNIS A
LEE, JAMES R
LEE, ALLAN R
LESLIE, GARY A
LEWICKI, JOHN A
LIEBING, KURT M
LINK, CHARLES R
LORENZO, GUSTAVO A
LOSEE, JEFFREY D
LOVE, FRANK W
LYNN, HENRY C

LYTER JR, HENRY B
LYTLE, RICHARD A

MACHISE, JAMES D
MADDEN JR, JOHN J
MAJERES, DARWIN A
MALONE, STEVEN J
MANDULEY, LEONARD F
MANN JR, WILLIAM D
MANNING, BOB S
MARCIANO, ANTHONY P
MARCINEK, JERRY V
MARINO, EDWARD H
MARKS, MARVIN D
MARSHALL, ROBERT W
MARTINEZ-ALEGRIA, JOSE
MASON, HUGH C
MATHISEN, NORMAN A
MATT JR, HAROLD A
MATTHEWS, PATRICK M
MAUGERI, PETER J
McCABE, LARRY
McCAFFERTY, ELWOOD S
McCARTHY, JOHN A
McCARTNEY, KENNETH L
MCCLANNAHAN, RICHARD W
McCORMICK, JAMES M
McKENNA, CHARLES E
McKENNA, WILLIAM D
McKENNAN, DAVID J
McKEON JR, ARTHUR T
McLAUGHLIN JR, JOHN A
McLEAN, DONALD W
McLERAN, CHARLES S
McRAE, JAMES D
MEANS, JAMES A
MENDEZ, EDUARDO F
MICHAEL, DONALD K

MIHALOW, ANDERLIN F
MILANETTE, R T
MILLER, CHARLES A
MILLER III, WILLIAM B
MILLER, DANIEL P
MILLER, ROBERT L
MILLER, F/O JAMES A
MILLER, FRANK P
MINARDI, JAMES V
MISENCIK, PAUL R
MISKOTTEN JR, EDWARD
MITCHELL, DON S
MITTELSTAEDT, GEORGE J
MOFFITT, ROBERT E
MOKTADIER, JOHN A
MOORE, ROBERT E
MOORE JR, ROY E
MORGAN, DAVID P
MORREY, FRANK J
MORRISON, EDWARD H
MORRISON, DAVID L
MOSLENER, CARL F
MUNSTERMAN, RICHARD A
MURPHY, TIMOTHY B
MURRAY, HOWARD M
MUSICK JR, CHARLES R

NAGY, STEVE I
NALL JR, ROBERT L
NELSEN, RONALD J
NELSON, DOUGLAS C
NESS, RONALD A
NEUMANN, PETER G
MICCHIA, LEONARD R
NICHOLSON, WILLIAM T
NICKERSON, CHARLES A
NIELSEN JR, PAUL K
NORMAN II, JOSEPH S

O'CONNELL, JOHN M
O'NEILL, RAMON E
OBERLANDER, DONALD H
OGDEN, THOMAS H
OSMAN, DALE E
OSTERLUND, JOHN R
OUZTS JR, JAMES F

PALERMO, FRANK G
PALMER III, DOUGLAS M
PAPPAS, THEODORE
PARADISE, LEONARD F
PARKINSON, RICHARD E
PARR, WILLIAM J
PARRAMORE, MARCUS L
PASCHKE, JAY M
PAULE, LEON T
PEACOCK, DONALD J
PEACON, ROBERT C
PEERY, THOMAS H
PENNIE, JEROME R
PENROD, GARY B
PERRY JR, ALBERT G
PETERSON JR, HERBERT W
PETERSON, MARK E
PETKO, JAMES G
PETTIT, BRIAN D
PHILLIPS, HENRY C
PHILLIPS, ROBERT A
PHILLIPS, TERRY E
PINKERTON, KENT R
PIPKIN, ROGER P
PLESSNER JR, JOSEPH D
POIRIER, NOEL A
POTTER, MARTIN H
POWELL, ELISHA T
PRIEST, PETER D
PUTONEN, LEONARD R

RAJU, KANPUR V
RAMAPRAKASH, TILAK S
RAWLS III, FLETCHER H
RAYBURN, HENRY C
REDD JR, WARREN J
REEH, CHARLES D
REIK JR, KARL M
REINHOLTZ, RONALD E
RHODES, EVERETT S
RICHARDS, FRANK L
RICKETTS JR, ROBERT M
ROBERTS, REGINALD
ROGERS, DOUGLAS J
ROHRBORN, ROBERT C
ROSALY, CARLOS
ROSENTHAL, EUGENE P
ROSMAN, KEN S
ROSS, THOMAS D
ROSS, BRUCE J
RUPERT II, JOHN F
RUSSELL JR, EDWIN F

SADR, SEYED A
SANDERS, JOHN W
SANDERSON JR, JARIB M
SANTIAGO, STANLEY
SARGEANT, JAMES S
SAUER, DETLEF P
SAVAGE, DAVID H
SCHANZLIN, DONALD N
SCHEDEL, JOHN R
SCHRAGE, JAMES A
SCHREINER, GARY H
SCHRINER JR, DAVID O
SCHULTHEIS, DALE H
SCOTT, SANFORD D
SECOR, EUGENE F
SEGARS, NELSON P

SELF, GARY W
SESSUMS, STEPHEN E
SEWELL JR, HUBERT J
SHARPE, DAVID F
SHEA JR, JOSEPH M
SHEEHAN, FREDERICK J
SHEPARD, GARY C
SHOUN, JOHN W
SIUKA, HUSSEIN H
SIMMONS, GARY W
SKINNER, JOHN J
SMITH, WAYNE L
SMITH, ANDREW C
SMITH, DAVID L
SMITH, JACK G
SOUDERS, JOHN E
SPENCE, WILLIAM M
SPIEKER JR, SAMUEL G
SPILLMAN, KEITH T
SPILLMAN, HARRY L
SPORT, WILLIAM A
STANDISH, RICHARD W
STANTON, DONALD H
STEPHEN, WILLIAM P
STEWARD, DONALD E
STEWART, WAYNE M
STIFEL III, ARTHUR C
STODDARD, GEORGE P
STONE, EDWARD E
STONE, CARY A
STONE, ALAN C
STONE JR, RAYMOND G
STOW, CALVIN E
StPHILIP, CARL S
STRADER, CAPT. JAMES R
STRADLEY, KENNETH W
STRAESSLE, GREGORY C

STREET JR, ROBERT B
STRONG, DONALD B
STROUP, ROBERT L
STUPKA III, OTTO J
SULLIVAN II, ENNIS C
SULLIVAN, ROBERT F
SULLIVAN JR, JOHN B
SWANSON, DAVID V
SYKES, RUSSELL E
SYMAN, JOHN E

TALTON III, WILLIAM G
TATE, JOSEPH F
TAYLOR, ROBERT A
TAYLOR, DEAN H
TAYLOR, JAMES M
TERKILDSEN, CARLEF A
TEW JR, BRANTLEY D
THOMPSON, ROGER L
THOMPSON, STEPHEN C
THOMSON III, JOHN D
THORNTON, KENNETH A
TIBBETTS, JOHN W
TILLEY, MARSHALL D
TOOLE IV, OLIVER A
TOWLEY JR, JAMES R
TRIGO, JUAN A
TRIPP, DALE P
TUCKER, DAVID W
TUCKER, TERRY T
TURMAN, JAMES B
TURNER, J R

UNGER, RICHARD L
URSO, M T

VanHOOSEAR, LEON L
VARA, RONALD W
VAUGHAN, MICHAEL D

VAUGHAN, STEPHEN D
VESTY, CHARLES H
VIETMEYER, PHILIP H
VILLANUEVA, RAFAEL
VINCENT, BENJAMIN B
VOEPEL JR, WILLIAM C
VOHRA, PANKAJ
VOUDY, JOHN E
VRECHEK, JOE D

WALDY, THOMAS F
WALKER, DONALD F
WALKER, TONY W
WALLACH, STEVEN E
WALTHER, FRANK O
WALTON, MICHAEL R
WARREN, DONALD E
WATERSTREET, MARK A
WATSON, MICHAEL D
WATT, ALLEN K
WEIR, JAMES R
WELLER JR, ALLSTON E
WEST, JAMES B
WEST, PETER
WESTBY, DOROTHY C
WESTPHALL, ROBERT C
WHITAKER, ROBERT B
WHITE, F/O ROBERT L
WHITEAKER, JERRY D
WHITLEY, DONALD F
WHITNEY, RICHARD A
WILCOX, GERALD P
WILKIE, JAMES R
WILLIAMS, JAN C
WILLINGHAM III, ROBERT B
WILLIS, HERBERT P
WINGATE, WESLEY A

WOOD, STEVEN C
WRIGHT, DEAN S

YATES, GARY W
YEATER, DONALD A
YERSAK, RICHARD J

ZENG, ROBERT E
ZIOBRO, THOMAS J